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IN THE

Supreme Court of the United States

No. 617

ROBERT L. GREENE, AUDITOR; SHERMAN GOODPASTER, TREASURER, AND JAMES P. LEWIS, SECRETARY OF STATE, CONSTITUTING THE BOARD OF VALUATION AND ASSESSMENT FOR THE STATE OF KENTUCKY, ET AL., APPELLANTS.

vs.

LOUISVILLE AND INTERURBAN RAILROAD COMPANY, APPELLEE.

AND

No. 618

ROBERT L. GREENE, AUDITOR; SHERMAN GOODPASTER, TREASURER, AND JAMES P. LEWIS, SECRETARY OF STATE, CONSTITUTING THE BOARD OF VALUATION AND ASSESSMENT FOR THE STATE OF KENTUCKY, ET AL., APPELLANTS.

vs.

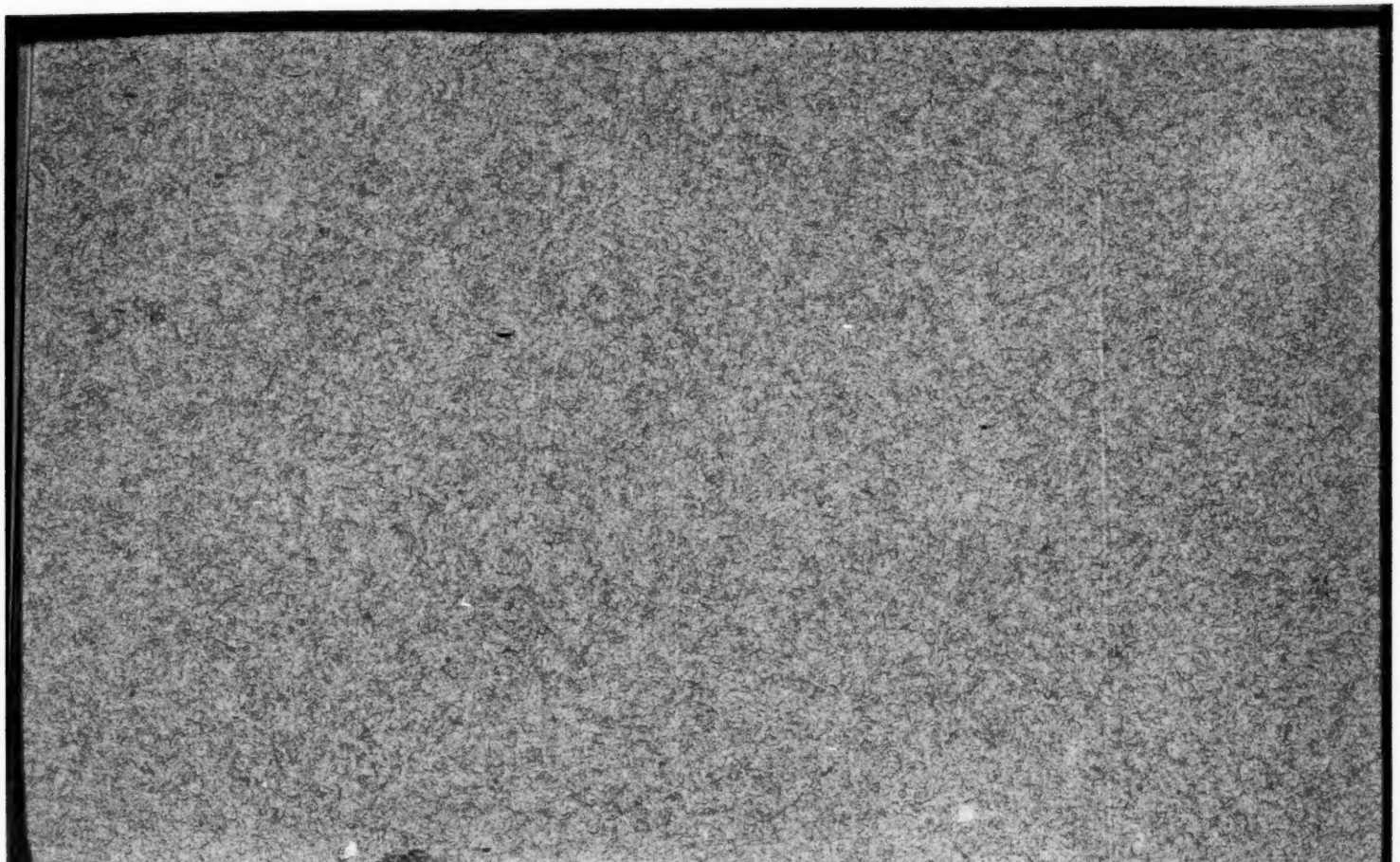
LOUISVILLE RAILWAY COMPANY, APPELLEE.

BRIEF FOR APPELLANTS.

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THE STATE JOURNAL, FRANKFORT, KY.



IN THE

Supreme Court of the United States

GREENE, AUDITOR, ET AL., - - - - - - - *Appellants,*

vs. (No. 617) October 1916 Term.

LOUISVILLE INTERURBAN RAILWAY COMPANY, - *Appellee.*

AND

SAME, - - - - - - - - - - - - - - - *Appellants,*

vs. (No. 618) October 1916 Term.

LOUISVILLE RAILWAY COMPANY, - - - - - *Appellee.*

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(1) There was no Federal question involved, therefore, the court had no jurisdiction.

(2) The bill states no cause of action against defendants or any of them, under the laws of the United States or the Commonwealth.

(3) The plaintiff had an adequate remedy at law if its complaint was true.

(4) The bill as amended shows no equity on its face.

(5) Because the action is a suit against the Commonwealth of Kentucky.

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Robert L. Greene, Auditor; Sherman Goodpaster, Treasurer, and James P. Lewis, Secretary of State, Constituting the Board of Valuation and Assessment for the State of Kentucky, Et Al., - - - Appellants,

vs.

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and

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vs.

Louisville Railway Company, - - - - - - Appellee.

BRIEF FOR APPELLANTS.

May It Please The Court:

The appellees, Louisville and Interurban Railroad Company and Louisville Railway Company, are Kentucky corporations doing business exclusively in that

State. The former operates electric lines of railroad, as a common carrier of freight and passengers, in the counties of Jefferson, Shelby and Oldham, in said State, and the latter operates an electric street railway in the city of Louisville, Jefferson County, Kentucky.

The appellants, Robert L. Greene, Auditor; Sherman Goodpaster, Treasurer, and James P. Lewis, Secretary of State, are officers of the State of Kentucky, and as such constitute a board known as the State Board of Valuation and Assessment, whose duty it is to assess the franchises of certain corporations which are required under the law of Kentucky to pay a franchise tax. Appellees come within the class of corporations which are required so to pay. The other appellants are State, district and county officers, who have certain duties to perform relative to the collection of said tax.

The laws of Kentucky regulating the assessment and taxation of franchises of corporations, and the duties of the various appellants in connection therewith, are fully set out in this brief.

The State Board of Valuation and Assessment, in accordance with its duties, as the members thereof understood, assessed the franchises of appellees for the year 1915, and notified them and each of the amount of the assessment. Complaint was made by appellees that the assessment was excessive, as compared to the assessment of other property in the State, but the board adhered to the assessment made. Thereupon appellees filed separate suits in the United States District Court for the Eastern District of Kentucky, charging in substance, that the State Board of Valuation and Assessment had assessed their franchises at their fair cash value, and that other property in the State, which property constituted about eighty per cent. of the entire taxable property of this State, was assessed by the

county assessors (whose duty it was to assess such property) at a rate not exceeding fifty-two per cent. of its fair cash value, and the assessment of appellees' property at its fair cash value was a discrimination against them and each, and was a taking of their property without due process of law and a denial of the equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States, and in violation of the Constitution of the State of Kentucky, and in disregard of the law of said State. They and each tendered into court the amount that would be due upon an assessment of their franchises on a valuation of sixty per cent., and sought by injunction to restrain the collection of any tax in excess of the amount due upon a sixty per cent. valuation.

During the progress of the litigation, several amended petitions were filed, but the sole purpose of those amendments was to make officers defendants, who succeeded those in office at the time the bills were filed, and do not in any manner change the nature of the controversy as set forth in original petition. The petition in the Louisville Railway case will be found on pages 2 to 8 inclusive, of record, and as it substantially contains all the questions argued in this brief, it will be hereafter alone referred to when the question of pleadings is considered.

MOTION BY APPELLANTS (DEFENDANTS) TO DISMISS PETITION OF APPELLEE (PLAINTIFF.)

The defendants and each moved the District Court to dismiss the petition of plaintiff for the following reasons:

1st. There was no Federal question involved, therefore the court had no jurisdiction.

2nd. The bill states no cause of action against the defendants, nor any of them, under the laws of the United States or the State.

3rd. The plaintiff had an adequate remedy at law, if its complaint was true.

4th. The bill as amended showed no equity on its face.

5th. Because the action is a suit against the State of Kentucky.

The motion of appellants was overruled by the District Court. They and each declining to plead further, a judgment was rendered in favor of appellee, enjoining and restraining appellants and each, from making any attempt to collect any taxes upon the property of appellee, on an assessment greater than sixty (60%) per cent. of its value. The judgment in full is found on pages 19 and 20 of transcript of record. A similar motion was made in case of Louisville & Interurban Railroad Company, and overruled, and in each case an appeal was prayed and granted by the District Court to this Court.

The Illinois Central Railroad Company, an Illinois corporation, and the Louisville and Nashville Railroad Company, a Kentucky corporation, both operating steam railroads as common carriers of freight and passengers, and whose franchises are subject to assessment and taxation in Kentucky, also filed suits against the State Board of Valuation and Assessment and certain other State and county officers, for the purpose of enjoining the collection on any franchise tax against them, or either, on an assessment in excess of sixty (60%) per cent. of the fair cash value of the franchise. Motions to dismiss those bills were filed by defendants, State officers, etc., and the motions were overruled. Then answers were filed and testimony heard, and upon a final hearing the District Court sustained the contention of the railroads in part, and entered final judgments.

From those final judgments appeals were prayed by the railroads, and cross-appeals prayed by the State officers.

The questions of law involved in the Louisville and Interurban case and Louisville Railway case are also involved in the Illinois Central case and the Louisville and Nashville case, and this Court ordered all of those cases to be heard together, although certain questions of law arising out of the questions of fact in the steam railroad cases are not involved in the electric railway cases. This brief, so far as it applies to the common questions of law in all the cases, is asked to be considered in all.

BILL OF PLAINTIFF (APPELLEES.)

It is conceded that under the Constitution of Kentucky, all property subject to taxation must be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale. We understand the bill of plaintiff (appellee) Louisville Railway Company, to concede that its franchise was assessed at its fair cash value. We base this statement upon the following language in the bill:

"The plaintiff states that the said Board of Valuation and Assessment arrived at the above result by the following method: It appeared from the report of the plaintiff (and said report was correct) that the plaintiff had paid out in interest $594,166.66, and in dividends $637,316.67. These, added together, made the sum of $1,231,483.33. But the said report showed that after deducting the above amount, expenses and taxes from the gross receipts, there was a deficit of $157,547.04. The Board deducted this amount from the interest and dividends paid, leaving a balance of $1,073,936.29. The Board then capitalized this amount at 6 per cent., took 75 per cent. of the result, and then fixed the value of the capital stock at $13,400,000.00—substantially the result arrived at arithmetically by the above method."

While in other parts of the petition it is stated, inferentially, that the Board of Valuation and Assessment assessed appellees' property at seventy-five (75%) per cent. of its fair cash value, yet when we consider that both under the Kentucky practice and the Federal practice, a pleading is construed most strongly against the pleader, Newman on Pleading (Kentucky, volume I., section 558; Foster Federal Practice. volume I., section 144, page 514; Phelps vs. McDonald, 99th United States, page 298), and the further fact that the State Board of Valuation and Assessment is, under the Constitution and laws of Kentucky hereinafter set out, required to value appellees' property for taxation at its fair cash value, that is, estimating it at the cash price it would bring at a fair voluntary sale, and that officers are presumed to do their duty, Turner vs. Yates, 16; Howard, 14; United States vs. Weed, 5th Wall, 62, it is evident that the allegations in appellees' petition, that the board capitalized the amount appellee had paid in interest and dividends for the year prior to the assessment at six (6%) per cent., and took seventy-five (75%) per cent. of the results, means that the board was of the opinion that seventy-five (75%) per cent. of the result was the amount the property, if sold for cash at a fair voluntary sale, would realize.

Therefore we will argue this case upon the assumption that the Board of Valuation and Assessment assessed appellees' property as the Constitution and the laws of Kentucky required it to be assessed.

SECTIONS OF STATE CONSTITUTION WHICH APPLY TO QUESTIONS IN CONTROVERSY.

"§ 171. *Levy and Collection of by General Laws—Uniformity.*—The General Assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to defray the estimated expenses of the Com-

monwealth for each fiscal year. Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation, within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws.

§ 172. *Assessment—How Value Fixed—Penalty.*—All property, not exempted from taxation by this Constitution, shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale; and any officer, or other person authorized to assess values for taxation, who shall commit any willful error in the performance of his duty, shall be deemed guilty of misfeasance, and upon conviction thereof shall forfeit his office, and be otherwise punished, as may be provided by law.

§ 174. *Corporate, to be Taxed Like Individual Property—Incomes—Licenses—Franchises.*—All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this Constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this Constitution shall be construed to prevent the General Assembly from providing for taxation based on income, licenses or franchises.

§ 182. *Railroads—Assessments of.*—Nothing in this Constitution shall be construed to prevent the General Assembly from providing, by law, how railroads and railroad property shall be assessed and how taxes thereon shall be collected. And until otherwise provided, the present law on said subject shall remain in force.

§ 209. *Railroad Commission—Number—Qualifications—Powers—Election—Term of Office—Removal of.*—A commission is hereby established, to be known as 'The Railroad Commission,' which shall be composed of three Commissioners. During the session of the General Assembly which convenes in December, eighteen hundred and ninety-one, and before the first day of June, eighteen hundred and ninety-two, the Governor shall appoint, by and with the advice and consent of the Senate, said three Commissioners, one from each

Superior Court District, as now established, and said appointees shall take their office at the expiration of the terms of the present incumbents. The Commissioners so appointed shall continue in office during the term of the present Governor, and until their successors are elected and qualified. At the regular election in eighteen hundred and ninety-five, and every four years thereafter, the Commissioners shall be elected, one in each Superior Court District, by the qualified voters thereof, at the same time and for the same term as the Governor. No person shall be eligible to said office unless he be, at the time of his election, at least thirty years of age, a citizen of Kentucky two years and a resident of the district from which he is chosen one year next preceding his election. Any vacancy in this office shall be filled as provided in section 152 of this Constitution. The General Assembly may, from time to time, change said districts so as to equalize the population thereof; and may, if deemed expedient, require that the Commissioners be all elected by the qualified voters of the State at large. And if so required, one Commissioner shall be from each district. No person in the service of any railroad or common carrier company or corporation, or of any firm or association conducting business as a common carrier, or in anywise pecuniarily interested in such company, corporation, firm or association, or in the railroad business, or as a common carrier, shall hold such office. The powers and duties of the Railroad Commissioners shall be regulated by law; and until otherwise provided by law, the Commission so created shall have the same powers and jurisdiction, perform the same duties, be subject to the same regulations, and receive the same compensation, as now conferred, prescribed and allowed by law to the existing Railroad Commissioners. The General Assembly may, for cause, address any of said Commissioners out of office by similar proceedings as in the case of Judges of the Court of Appeals, and the General Assembly shall enact laws to prevent the nonfeasance and misfeasance in office of said Commissioners, and to impose proper penalties therefor."

It is not disputed that under the sections of the Constitution above set forth, all property in the State should be valued for taxation at its fair cash value, estimated at the cash price it would bring at a fair voluntary sale, and that an intentional failure on the part of the assessing officers to assess property for taxation at this value is a violation of the laws of Kentucky.

Under section 99 of the State Constitution, a county assessor is elected for each county every four years. His duties are not prescribed by the Constitution, but are left to Legislature; but it is provided by section 104 of the Constitution that no one shall be eligible for the office of assessor two consecutive terms, and by section 227 of the Constitution it is provided that assessors, among other county officers, "Shall be subject to indictment or prosecution for misfeasance or malfeasance in office, or willful neglect in discharge of official duties, and upon conviction, his office shall become vacant," and by section 228 of the Constitution, all officers of the State, before they enter upon the execution of the duties of their respective offices, shall take an oath to faithfully execute to the best of their ability, according to law, the offices to which they are elected or appointed.

So it appears that the Constitution of the State has attempted to compel every officer to faithfully discharge his duty. It may be here stated that under the law of Kentucky the duty of assessing property is confided to different officers. The duty of assessing real estate (except the real estate of railroads), and all personal property, tangible and intangible, is confided to one set of officers, the county assessors, one of whom is elected every four years in each county. The tangible property of railroads is assessed by the railroad commissioners. Distilled spirits are assessed by the State Board of Valuation and Assessment. In addition to the tax upon real estate and tangible personal property and intangible

personal property, in the nature of promissory notes, money in bank, stocks and bonds, there is another character of property known as the franchise of certain designated corporations, and the value of this franchise is fixed for assessment by a board known as the State Board of Valuation and Assessment, which consists of the Auditor, Treasurer, and Secretary of State. Each assessing power in the discharge of its duties, is absolutely disconnected from the other, and neither has any control by direction or indirection over the acts of the other.

After an assessment is made by the County Assessor, a board known as the County Board of Equalization meets and passes upon the individual assessments made by the County Assessor.

There is also another board created, known as the State Board of Equalization, which has the power and whose duty it is to consider the various assessments of each county as a whole, and to determine whether or not the property in the county as a whole has been assessed in accordance with the Constitution, and if not so assessed, to raise the assessment of the county as a whole such a per cent. as in the judgment of the board will make the assessment as nearly as practicable an assessment at the fair cash value of the property in the county.

The law provides a method of redress for the individual taxpayer if he believes he has been aggrieved by the taxation fixed by the assessor, and representatives of the various counties in the State may appear before the State Board of Equalization, for the purpose of protecting the interests of the county as a whole.

We here insert the provisions of the Kentucky Statutes governing the duties of the County Assessors, of the County Board of Supervisors, and the duties of the State Board of Equalization:

COUNTY ASSESSORS.

"§ 4020. *Property Subject—Tangible and Intangible Property—Franchises.*—All real and personal estate within this State, and all personal estate of persons residing in this State, whether the same be in or out of the State, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises as herein provided, shall be subject to taxation unless the same be exempt from taxation by the Constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale: Provided, however, That tangible personal property located and having a taxable situs without the State, of persons residing in this State, and of all corporations organized under the laws of this State, shall not be subject to taxation: And, provided further, That the situs of intangible personal property for purposes of taxation shall be at the residence of the real or beneficial owner, and not at the residence of the fiduciary or agent having the custody or possession of same. Provided further, That nothing herein contained shall in any way affect the liability for franchise taxes now payable by corporations organized under the laws of this State.

§ 4044. *Oath—Assessor—Deputies Shall Take.*—The assessor and his deputies, before they enter upon the duties of the office, shall, in addition to the oath prescribed by the Constitution, take the following oath: 'I do swear that I will administer to every person listing property of any description the oath prescribed by law, and fix the value of all property to be listed by me at its fair cash value, estimated at the price it would bring at a fair voluntary sale, without favor or partiality; and I will diligently search and inquire so that no person shall be passed over, or shall fail to have an opportunity to give a list of his taxable property, and that I will truly report all persons who shall fail or refuse to list their taxable property, after being duly called on by me for that purpose, or who have given in a false or fraudulent list, so help me, God.'

§ 4045. *Bond of Assessor—Action On.*—The assessor shall at the same time execute bond to the Com-

monwealth, with good surety, to be approved by the county court, for the faithful discharge of the duties of his office, which bond shall be filed in the office of, and kept safely by, the clerk of the county court, and on which the assessor and his sureties shall be liable for any violation of the duties of his office, by himself or any of his deputies. Action may be instituted on it by the Commonwealth or any person aggrieved, and recovery had thereon, from time to time, to the extent of the injury sustained.

§ 4047. *Oath to Taxpayer—Assessor May Correct List.*—The assessor or his deputies shall read and administer to every person listing property the following oath: 'You swear that the list of taxable property about to be given by you will contain a full and complete list, and the best description you can give, of all and every species of property belonging to you or in your possession, subject to taxation on the first day of September last, including all money, notes, bonds or other evidence of debts except bonds not taxable, and stock in corporations whose property and franchise have been listed by the corporation, and that, according to your best judgment, you will value your property at its fair cash value, estimated at the price it would bring at a fair voluntary sale; and that you will true and perfect answers make to all questions that may be asked you concerning your taxable property, or that of others in your possession, or about to be listed by you for them.' If, in the opinion of the assessor or deputy, there be any error in any list, it shall be his duty to note same on his tax books so as to call the attention of the board of supervisors thereto.

§ 4051. *False Statement or Device to Escape Taxation—Penalty.*—If any person shall wilfully make a false statement, or, for the purpose of avoiding taxation, make a temporary investment in securities exempt by law from taxation, or convert any intangible property into non-taxable property outside of this State, or resort to any device whatever for the purpose of avoiding taxation, he shall be deemed guilty of a misdemeanor, and, on conviction, fined any sum not exceeding five hundred dollars, and be subject to three times the amount of tax

upon his estate, to be recovered by the sheriff by action in the name of the Commonwealth in the county in which the estate is liable for taxation, or by the auditor, when the taxes are payable to him, in the Franklin circuit or quarterly court.

§ 4053. *Assessor to Fix Value Upon All Estate Listed With Him—Report to Supervisors.*—The assessor, from his knowledge, and from the statement of the person listing the property for taxation, and such other evidence as he may be able to obtain upon oath of witnesses sworn by him, shall fix the value upon all the estate listed with him for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale, and enter the same in his tax book, in the proper name and title of things, together with the Christian and surname of the person, and other information designated in the form of the tax book prescribed by law, giving also the aggregate value of the property assessed, and, in estimating the value of lands, the increased value, on account of all improvements thereon, shall be taken into consideration. If the value fixed by the assessor be greater than that fixed by the taxpayer it shall be the duty of the assessor to notify the taxpayer at the time of the assessment the amount of such increase and of the time and place of the meeting of the board of supervisors. The assessor shall report to the board of supervisors a list of all taxpayers in the county whose tax lists have been added to or increased by him after receiving them from the hands of the taxpayer, together with a short statement.

§ 4058. The following shall be the form of oath which shall be printed on each schedule, which the party whose list is taken shall subscribe and swear to before the assessor or his deputy as soon as such schedule shall be completed; and all persons failing or refusing to take such oath shall be deemed guilty of refusing to give in their property for assessment, and be fined as provided for such offenses:

STATE OF KENTUCKY,

..... County,
Scilicet.

'I do solemnly swear (or affirm) that the foregoing schedule contains a true, full and complete list of all taxable property belonging to me on the first day of September, 19....., and, to the best of my knowledge, belief and judgment, the values fixed by me to the various articles as above, is the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale, and that to the best of my knowledge, belief and judgment, none of said articles would bring any greater sum at any such sale, than as stated above, and that I cannot realize any greater sum on the notes and accounts owned and held by me against others than as stated by me in said schedule, and that the answers made by me to the above interrogatories are true.

.....

'Subscribed and sworn to before me by .....
..... this ..... day of ....., after said oath was read to him by me.

....., Assessor.

'It shall be the duty of every assessor or deputy to read said oath in full to each taxpayer and to see that no item has been passed unanswered before he shall be allowed to sign or swear to it. Any assessor or deputy who shall violate either of these provisions shall be deemed guilty of a misdemeanor and, on conviction, be fined fifty dollars for each offense; and any person who shall make a false statement as to any matter with reference to the listing of his property for taxation shall be deemed guilty of false swearing and, on conviction, shall be punished accordingly.'

§ 4076. *Penalty for Wrongfully Listing Land.*—That any assessor who shall list any of said land in violation of this act shall be guilty of a misdemeanor, and fined not exceeding two hundred dollars for each offense.

§ 4076a. *Penalty for Failure of Duty by Assessor.*—The assessor shall, for any failure of his duty under this law, where no other penalty is provided, be fined in any sum not less than twenty-five dollars nor more than fifty dollars.

COUNTY BOARD OF SUPERVISORS.

§ 4115. *County Judge to Appoint—Number.*—The county judge, except in counties having a city therein of the first, second, third or fourth class, shall, at the November term of each court, appoint five intelligent, discreet housekeepers and owners of real estate residing in different portions of the county and in counties having a city therein of the first or second class he shall appoint three additional persons in such city and from different wards thereof; and in counties having a city therein of the third or fourth class, he shall appoint two additional persons from each city and from different wards thereof, who shall constitute the board of supervisors of tax in their respective counties.

§ 4117. *Oath Supervisors Shall Take.*—The supervisors, before they enter upon the discharge of their duties, shall take the following oath: 'You swear that you will, to the best of your ability, discharge the duties required of you as supervisor of tax, and that, in each instance where the property has not been assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale, you will increase or decrease the value, and fix the value at what you believe the property would bring at a fair voluntary sale.'

§ 4120. *Duty and Powers of Supervisors.*—The board of supervisors shall make a careful examination of the assessor's books, and each individual list thereof, and may increase or decrease any list; but the board shall not reduce or raise any assessment unless the evidence be clear and unmistakable that the valuation is not a fair cash value, and shall list all property omitted by the assessor which may be subject to taxation in the county, and shall correct any errors of the assessor; and in cases where the property has not been correctly valued, they shall fix the value thereof, and correct the assessor's books, so as to show the true value of the property, as herein provided; but should any property escape assessment by the assessors or supervisors, in whole or in part, it may be assessed as provided in section 3, article 15 (4241).

STATE BOARD OF EQUALIZATION.

§ 4268. *Appointment—Number—Term—Qualifications—Quorum.*—It shall be the duty of the Governor to annually appoint one person for each appellate district of this State, and they, together with the auditor of public accounts, who shall be an ex-officio member without additional compensation, shall constitute a State Board of Equalization and Assessment. No person shall be eligible to appointment on the board by the Governor who is under thirty years old, and he shall be a housekeeper and shall be the owner in fee of real estate lolated in this State. The members of this board shall hold this office for a period of one year, and until their successors are appointed and qualified. The term of office of said persons to be appointed as aforesaid shall begin on the first day of January, one thousand nine hundred and three, and annually thereafter. It shall require five members of said board present to constitute a quorum: Provided, That all seven of the members of said board to be appointed under the provisions of this act on the first day of January, 1908, shall be appointed as follows: Three of same to serve for only two years, and their successors shall be appointed to serve for four years, and the remaining four members appointed on January first, 1908, shall be appointed to serve for four years, and their successors shall be appointed to serve for a period of four years; and all members of said board appointed after 1908 shall serve for a term of four years. and said board shall complete its labors not later than the first day of June in each year.

§ 4269. *Oath of Office.*—Each member of said board, before entering upon the duties of said office, shall take the oath or affirmation prescribed by the Constitution of the State.

§ 4274. *Percentage of Values Fixed—Notice to County Judges—Hearing Witnesses.*—The said board of equalization shall fix the percentage of assessed value of real property at its fair cash value, and all counties whose average lists of real property fall below such value shall be raised to the same, and all those counties whose average lists are above the same, shall be lowered

to said cash value. The secretary to the State Board of Equalization shall report to the various county judges of this Commonwealth, as soon as possible, the action of the board in regard to their respective counties, whereupon said judges may, in their discretion, each appoint not exceeding five witnesses to appear under oath before said board in reference to the action of the board. The board shall then revise their action or not, as they may think just and proper. Said witnesses must appear in a reasonable time, or they shall lose their right to be heard. The compensation and expenses of said witnesses, if any, shall be paid by their respective county courts.

§ 4275. *Personal Property.*—The said board of equalization shall also equalize the personal property of every county in this Commonwealth by adding to or subtracting from the list of personal property, as the case may be, the same per centum as was added to or subtracted from the list of farm lands for the same county, and for this purpose the average per centum of assessed value to cash value of farm lands shall be used, and in determining such per centum, fractions less than one-half shall be rejected, and fractions of one-half or over shall be counted as one."

It will be seen from the foregoing statutes that great care is taken to see that the property required to be assessed by the county assessors is assessed at its fair cash value, in accordance with the State Constitution. All of the property in the State, as heretofore stated, is assessed by the county assessor, except the property of railroads, the franchises of certain corporations, and distilled spirits. The tangible railroad property is assessed by the railroad commissioners, under sections 4096 and 4098 of Kentucky Statutes, which are as follows:

"§ 4096. *To Report to Auditor—Penalty for Failure.*—That the president or chief officer of each railroad company, or other corporation owning or operating a railroad line, in whole or in part, in this State, and all

railroad bridge companies owning or operating the bridge spanning a river constituting the boundary of this State shall, on or before the first of August in each year, return to the auditor of public accounts of the State, under oath, the total length of such railroad, including the length thereof beyond the limits of the State, and designating its length within this State, and in each county, city, incorporate town and taxing district therein, together with the average value per mile thereof, and in the respective counties, cities, incorporated towns and taxing districts therein, together with the average value per mile thereof, for the purpose of being operated as a carrier of freight and passengers, including engines and cars, and a list of the depot grounds and improvements, and other real estate of the said company, and the value thereof, and the respective counties, cities and incorporated towns in which the same are located. That if any of said railroad companies own or operate a railroad or railroads out of this State, the president or chief officer of such company shall only be required to return such proportion of the entire value of all its rolling stock as the number of miles of its railroad in this State bears to the whole number of miles operated by said company in and out of this State. Said report shall be made as of the first day of July, and a failure to file said report by the first day of August shall subject the president or chief officer residing in this State to a fine of one thousand dollars, and fifty dollars for every day after the first day of August that he fails to file said report, to be recovered as indicated by section 9 (4104) of this article.

§ 4098. *Railroad Commission to Equalize.*—The auditor shall lay before the railroad commission, on or before the fifteenth day of August, the returns made to him under this act, and any schedules and valuations he may have made under sections 1 and 2 (4096 and 4097), of this article. And should the valuations, or any of them, in the judgment of said board, be either too high or too low, they shall correct and equalize the same by a proper increase or decrease thereof. Said board shall keep a record of their proceedings, to be signed by each member present at any meeting, and the said board is

hereby authorized to examine the books and property of any railroad company to ascertain the value of its property, or to have them examined by any suitable disinterested person, to be appointed by them for that purpose."

This refers, of course, to the tangible property of railroads. Distilled spirits are assessed by the Board of Valuation and Assessment, composed of the Auditor of Public Accounts, Treasurer of State and Secretary of State. The provisions relating to assessments are found in sections 4105-4106-4107 Kentucky Statutes, which are as follows:

"§ 4105. *Owner of Warehouse to Report to Auditor.*—Every owner or proprietor of a distillery bonded warehouse in which distilled spirits are stored shall, between the first day of September and the first day of October of each year, report to the auditor of public accounts, in writing, sworn to by the person making the report, or, if the owner or proprietor of such warehouse be a corporation, the report shall be made and sworn to by its principal officer or manager in charge. Such report shall show the quantity and kind of spirits in such warehouse on the first day of September in the year the statement is required to be made, the dates when made, the county, city, town or taxing district in which the warehouse is situated; whether or not the United States Government tax has been paid thereon; if not, the date of expiration of the bonded period; the fair cash value of the spirits estimated at the price it would bring at a fair voluntary sale, and such other facts pertaining to such spirits as the auditor may require.

§ 4106. *Reports—Auditor to Submit to Board of Valuation—Record to be Kept.*—That the said reports shall be, by the auditor of public accounts, submitted to a board of valuation and assessment composed of the Auditor of Public Accounts, the Treasurer of the State and the Secretary of State, who are hereby constituted such board, and said board shall fix the values for the purpose of taxation under this act, and assess the same accordingly, and shall keep a record of their valuations

and assessments in a book provided for that purpose, and said record shall be evidence in all courts for the proceedings of said board.

§ 4107. *Board to Assess—Notice to Owners—Hearing.*—The auditor of public accounts shall file such reports with the board, which shall assess the spirits for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale. The board shall at once notify the owner or proprietor of the warehouse of the amount so fixed; and such owner or proprietor shall have thirty days, after receiving the notice, to go before the board and ask a change of the valuation, and may introduce evidence; and the board may make such changes as it may deem proper. The action of the board shall be final."

In addition to the property mentioned in above sections, which is assessed for taxation, a number of corporations named in section 4077 of Kentucky Statutes, "Also every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town or taxing district, where its franchise may be exercised."

The sections of the Kentucky Statutes governing this character of assessments are 4077-78-79-80-81-82-83-84-86-90-91, which are as follows:

"§ 4077. *Franchise—Assessment Of.*—Every railway company or corporation, and guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace-car company, dining-car company, sleeping-car company, chair-car company, and every other like company, corporation or associa-

tion, also every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town or taxing district, where its franchise may be exercised. The Auditor, Treasurer and Secretary of State are hereby constituted a board of valuation and assessment for fixing the value of said franchise, except as to turnpike companies, which are provided for in section 1 (4095) of subdivision 4 of this article, the place or places where such local taxes are to be paid by other corporations on their franchise, and how apportioned, where more than one jurisdiction is entitled to a share of such tax, shall be determined by the board of valuation and assessment, and for the discharge of such other duties as may be imposed on them by this act. The Auditor shall be chairman of said board, and shall convene the same from time to time, as the business of the board may require. It shall be the duty of the Attorney-General, when requested by the Board of Valuation and Assessment, to attend said board at its meetings and advise with same in its proceedings.

§ 4078. *Corporations to Report to Auditor to Determine Value of Franchise.*—In order to determine the value of the franchises mentioned in the next preceding section, shall annually, between the thirtieth day of June and the first day of October, make and deliver to the Auditor of Public Accounts of this State a statement, verified by its president, cashier, secretary, treasurer, manager, or other chief officer or agent, in such form as the Auditor may prescribe, showing the following facts, viz.: the name and principal place of business of the corporation, company or association; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price at wh such stock was sold at a bona fide sale within twelve months next before the thirtieth day of June of the year in which the statement is required to be made; the amount of surplus funds and undivided

profits and the value of all other assets; the total amount of indebtedness as principal, the amount of gross or net earnings or income, including interest on investments, and incomes from all other sources for twelve months next preceding the thirtieth day of June of the year in which the statement is required; the amount and kind of tangible property in this State, and where situated, assessed, or liable to assessment in this State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale, and such other facts as the Auditor may require.

§ 4079. *Value of Franchise—How Determined—Lines Extend Beyond State or County.*—Where the line or lines of any such corporation, company or association extend beyond the limits of the State or county, the statement shall, in addition to the other facts hereinbefore required, show the length of entire lines operated, owned, leased or controlled in this State, and in each county, incorporated city, town or taxing district, and the entire line operated, controlled, leased or owned elsewhere. If the corporation, company or association be organized under the laws of any other State or government or organized and incorporated in this State, but operating and conducting its business in other States as well as in this State, the statement shall show the following facts in addition to the facts hereinbefore required: The gross and net income or earnings received in this State and out of this State, on business done in this State, and the entire gross receipts of the corporation, company or association in this State and elsewhere during the twelve months next before the thirtieth day of June of the year in which the assessment is required to be made. In cases where any of the facts above required are impossible to be answered correctly, or will not afford any valuable information in determining the value of the franchise to be taxed, the said board may excuse the officers from answering such questions; Provided, That said board, from said statement, and from such other evidence as it may have, if such corporation, company or association be organized under the laws of this State, shall fix the value of the capital stock of the corporation, company, or association, as provided in the

next succeeding section, and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this State, or in the counties where situated. The remainder thus found shall be the value of its corporate franchise subject to taxation as aforesaid.

§ 4080. *Foreign Corporations — Franchise — How Determined.*—If the corporation, company or association be organized under the laws of any other State or government, except as provided in the next section, the board shall fix the capital stock in this State by capitalizing the net income derived in this State, or it shall fix the capital stock as hereinbefore provided, and will determine from the amount of the gross receipts of such corporation, company or association in this State and elsewhere, the proportion which the gross receipts of this State, within twelve months next before the thirtieth day of June of the year in which the assessments were made, bears to the entire gross receipts of the company, the same proportion of the value of the entire capital stock or the capitalizing of the net earnings in this State, less the assessed value of the tangible property assessed, or liable to assessment, in this State, shall be the correct value of the corporate franchise of such corporation, company or association for taxation in this State.

§ 4081. *Interstate Carrier — Franchise — How Fixed.*—If the corporation organized under the laws of this State, or of some other State government, be a railroad, telegraph, telephone, express, sleeping, dining, palace or chair-car company or a corporation performing any other public service, the lines of which extend beyond the limits of the State, the said board will fix the value of the capital stock as hereinbefore provided, and that proportion of the value of the capital stock which the length of the lines operated, owned, leased, or controlled in this State, bears to the total length of the lines owned, leased or controlled in this State and elsewhere, shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this State; and such corporate franchise shall be liable to taxation in each county, incorporated city, town or district through or into which such lines pass, or are operated, in the same proportion that the length of the line

in such county, city, town or district bears to the whole length of lines in this State; but if any such railroad or other corporation organized under the laws of this State have all of its lines outside of this State, the said board shall fix the value of its entire capital stock as hereinbefore provided, and apportion to this State for taxation therein the proper proportion and not less than one per cent. of its said capital stock, and the amount so apportioned shall be the value of its intangible property, including its corporate franchise, stocks, bonds, securities and choses in action, subject to taxation in this State and in the county, city, town and district where its principal place of business in this State may be located.

§ 4082. *Persons Engaged In Certain Business—How Valued for Taxation.*—Whenever any person or association of persons not being a corporation, nor having capital stock, shall, in this State, engage in the business of any of the corporations mentioned in the first section of this article, then the capital and property, or the certificates or other evidences of the rights or interests of the holders thereof in the business or capital and property employed therein shall be deemed and treated as the capital stock of such persons or association of persons for the purpose of taxation and all other purposes under this article, in like manner as if such person or association of persons were a corporation.

§ 4083. *Auditor to Notify Corporation of Values.*—It shall be the duty of the Auditor, immediately after fixing such values by said board, to notify the corporation of the fact; and all such corporations shall have thirty days from the time of receiving the notice to go before such board and ask a change of the valuation, and may introduce evidence, and the chairman of the board is hereby authorized to summons and swear witnesses and, after hearing such evidence, the board may change the valuation as it may deem proper, and the action of the board shall be final.

§ 4084. *Auditor to Certify to County Clerk.*—The Auditor shall, at the expiration of thirty days after the final determination of such values, certify to the county clerk of the counties, when any portion of the corporate franchise of any such corporation, company or associa-

tion shall be liable to local taxation as herein provided, the amount thereof liable for county, city, town or district tax, and such certificate shall be by each county clerk filed in his office, and be by him certified to the proper collecting officer of the county, city, town or taxing district for collection, and all county, city, municipal, school and other taxes shall be due and payable thirty days after the notice of the amount of such tax is given by the officer whose duty it is to collect the same.

§ 4086. *Pay Taxes Into State Treasury.*—All corporations and other persons who are required to make reports to the Auditor of Public Accounts shall pay all taxes due the State from them into the treasury at the same time, and shall be liable for and pay the same rate of interest and penalties as defaulting individuals, except where otherwise specially provided.

§ 4090. *Corporation Failing to Report—Board to Fix Values.*—Should any corporation fail to make the reports as required herein on or before the first day of October of each year, the said board shall proceed to ascertain the facts and values as required by this article, in such manner and by such means as it deems proper, at the cost of the company failing to make the report, and shall fix the value of the corporate franchise liable for taxation as aforesaid and the corporation shall be taxed accordingly.

§ 4091. *Taxes, When Due—Penalties—Clerks to Furnish Statement of Value of Tangible Property.*—All the State taxes assessed against any corporation, company or association, under this article, shall be due and payable thirty days after notice of the same has been given said corporation, company or association by the Auditor; and all county, municipal, school and other taxes shall be due and payable thirty days after notice of the amount of said tax is given by the officer whose duty it is to collect the same; and every such corporation, company or association failing to pay its taxes, after receiving thirty days' notice, shall be deemed delinquent, and a penalty of ten per cent. on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of ten per cent. per annum. Any such corporation, company or association failing to pay

its taxes, penalty and interest, after becoming delinquent, shall be deemed guilty of a misdemeanor and, on conviction, shall be fined fifty dollars for each day the same remains unpaid, to be recovered by indictment or civil action, of which the Franklin circuit court shall have jurisdiction. It shall be the duty of the county clerk to furnish to the Auditor of Public Accounts on blanks provided by the Auditor, a statement of the assessed value of the tangible property of all corporations, companies or associations paying a franchise or other tax under this act.

Any county clerk failing to comply with the requirements of this act shall be guilty of a misdemeanor and, on conviction, shall be fined not less than ten nor more than twenty-five dollars."

It will be seen upon examination of the statutes above quoted, that for the purpose of assessment for taxation the property in Kentucky is divided into four classes: Real estate and personal property of individuals and of non-franchise corporations, is assessed by the county assessors of each county, both for State and county purposes; tangible railroad property is assessed by the railroad commissioners; distilled spirits are assessed by the State Board of Valuation and Assessment, and corporate franchises are assessed by the State Board of Valuation and Assessment.

Neither assessing authority has jurisdiction or control over the other. Each acts separately and independently in its own sphere. The State Board of Valuation and Assessment has no authority, directly or indirectly, to control the actions of the county assessors; the county assessors have no power to control, directly or indirectly, the actions of the State Board of Valuation and Assessment. So we have three different assessing bodies, assessing different classes of property in Kentucky.

THIS ACTION IS AN ACTION AGAINST THE STATE OF KENTUCKY.

It is the contention of appellants that this action is an action against the State of Kentucky, and cannot be maintained.

The eleventh amendment to the Constitution of the United States reads as follows:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

This section of the Constitution has been a fruitful source of litigation since its adoption in 1798. It would be an unnecessary burden upon this court to quote and attempt to analyze the various decisions bearing upon this question.

It seems to us that in the opinion in Ex Parte Young, 209th United States, beginning on page 123, this court has thoroughly examined the various prior decisions of this court upon this subject, and the conclusions announced in that case are the settled law of this question.

Those conclusions have been reiterated in numerous opinions since that time. The latest so far as we have been able to discover in that of Traux vs. Raich, decided November 1st, 1915, and reported in 239 United States, beginning on page 33. In Ex Parte Young, the doctrine is laid down as follows:

"The various authorities we have referred to furnish ample justification for the assertion that individuals who, as officers of the State are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings either of a civil or criminal nature, to enforce against

parties affected, an unconstitutional act, violating the federal constitution, may be enjoined by a federal court of equity from such action."

And in Yick Wo vs. Hopkins, 118 U. S., beginning on page 356, this further statement of the law is made:

"Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authorities with an evil eye and unequal hand, so as to practically make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution."

This principal of interpretation has been sanctioned by this court in Henderson vs. Mayer, 92 U. S. 259; Chylung vs. Freeman, 92 U. S. 275; Ex Parte Va., 100 U. S. 339; Neal vs. Delaware, 103 U. S. 370, and Soon Hing vs. Trowly, 113 U. S. 703. And the case of Yick Wo vs. Hopkins, *supra,* is referred to as authority in the case of Home Telephone and Telegraph Company vs. Los Angeles, 227 U. S., beginning on page 278.

So it appears to be the settled law, not without vigorous protest however, from various members of this court, that where a State act is unconstitutional and State officers attempt to enforce the act and the enforcement would result in injury to the person or property of a citizen, that citizen may appeal to the federal courts for protection under the provisions of the 14th amendment to the Constitution of the United States, or if the State act is constitutional but the manner of its enforcement by the State authorities, whose duty it is to enforce it, is discriminatory, and such discriminatory enforcement will result in an injury to the person or property of a citizen, that citizen may also appeal to the federal court for protection under the provisions of the 14th amendment to the Constitution of the United States, and the plea by the State officers that the suit is a suit

against the State and prohibited by the 11th amendment of the Constitution of the United States in unavailing.

This is as far as this court has ever gone in upholding the jurisdiction of a federal court against a State officer acting under the authority of a State law. It has never held in any action where the question has been raised, so far as we have been able to discover, that where a State officer is seeking to enforce a constitutional law in the manner provided by law, and which manner is in no wise objectionable to any section of the federal constitution, that such officer can be enjoined in a federal court, because some other officer of the State, who is in no manner connected with him, and over whom he has no control, directly or indirectly, chooses to violate a State law in the discharge of his duties.

That is exactly this case.

The State Board of Valuation and Assessment is created by a law which is conceded to be constitutional under the United States and the State Constitution. The duties which that board is required to perform, if performed as directed by the statute, are in full accord with the United States and the State Constitution. It is conceded that the State Board has complied with the provisions of the law prescribing its duties, and yet it is held that because the local assessors have failed to comply with the State law prescribing their duties, that the Board of Valuation and Assessment must violate its oath of office, violate the law of its creation, and make assessments in direct violation of both.

This, as we view it, is neither more nor less than an attempt on the part of appellees to seize upon the State and compel it through this board to so change its laws that the Board of Valuation and Assessment will have the right to regulate its assessments according to the acts of the county assessors or to compel the State through this board to so regulate the acts of the county

assessors that they will be compelled to adopt a different system of valuation than that which they have followed in the past.

The Board of Valuation and Assessment, under the law, has no power other than to fix the value of the property it assesses, at its fair cash value. To do otherwise would be in direct violation of the law of its creation. It has no power to act as a board of equalization and reduce the value of the property it assesses below the fair cash value, in order to have its assessments conform to the assessments of the county assessors. To do so would be a violation of the law of its creation and a violation of the oath taken by each member of the board.

If the question is asked the members of the board, "What is your duty with regard to the assessment of franchises?" the answer would be, "Under the Constitution of Kentucky and under the Kentucky laws providing for assessment of franchises, which follow the Constitution, the board is required to assess the franchises of the corporations over which it has jurisdiction at their fair cash value."

If the question is asked the members of the board, "Are the sections of the Constitution of Kentucky and the provisions of the Kentucky Statutes regulating this subject, in accord with the Constitution of the United States?" the answer will be, "It is conceded by the corporations whose franchises are assessed, that the sections of the Constitution of Kentucky regulating the assessment of franchises, and the laws of the State enacted in pursuance of such sections of the Constitution, are constitutional, and they have been so decided by the Supreme Court of the United States in Adams' Express Company vs. Kentucky, 166 United States, beginning on page 170."

If the members of the board are asked, "In making the assessment of franchises of corporations, including

appellees herein, did you follow the sections of the Constitution of the State of Kentucky relative thereto, and the laws of the State enacted in pursuance and by authority thereof?" the answer would be "The board so did."

If asked "What control have you, directly or indirectly, over the county assessors who assess real property, and tangible personal property?" the answer would be "We have none."

If asked "What would follow if the board reduced the assessment of franchises below their fair cash value, in order to equalize those assessments with the assessments of other property, made by county assessors?" the answer would be, "We have no power to equalize assessments," and if the board attempted to do so, its members would violate the oath they had taken as members, and would violate the laws of the State of Kentucky, and be subject to impeachment under section 68 of the Constitution of the State, which provides:

"All civil officers shall be liable to impeachment for any misdemeanors in office, but judgment in such cases shall not extend further than removal from office, and disqualification to hold any office of honor, trust or profit, under this Commonwealth."

But the party convicted shall nevertheless be subject and liable to indictment, trial and punishment by law, because what the board would do would constitute a misdemeanor committed by each member thereof, by virtue of 4029 Kentucky Statutes, which provides:

"When no other penalty is mentioned for a failure to do an act, or the doing of an act forbidden (or required) by this chapter, the penalty in all such cases shall be not less than ten dollars nor more than five hundred dollars."

Thus we see that the things which appellees require the board to do, and which the judgment of the lower court requires it to do, are things which are forbidden by the Constitution of the State of Kentucky, forbidden by the laws of the State of Kentucky, forbidden by the oath of office taken by members of the board, and the doing of which would subject each member to severe penalties, and no act which they did under the Constitution and the laws of Kentucky is in any manner in conflict with any section of the Constitution of the United States, the sole complaint being, as heretofore said, that other officers over whom the board had no control, did not do their duty.

If this is not an attempt to sue the State, we cannot conceive of a case where such an attempt was made, and we are constrained to the conclusion that the judgment of the lower court in those cases is in effect a repeal, by judicial construction, of the eleventh amendment to the Constitution of the United States.

The case of Hagood vs. Southern, 117 United States, beginning on page 53, is referred to in Ex Parte Young, and the doctrine of that case is approved. In that case, it appears the State of South Carolina, through its legislature, in 1868, had guaranteed certain bonds of the Blue Ridge Railroad Company in South Carolina. In 1872 the legislature of the State passed a bill to relieve the State from this guarantee by providing for the securing and destruction of the bonds. The bill in substance provides that all bonds held by the agents of the State as security for money advanced to the railroad company, be delivered up and cancelled, that when the company surrendered to the State the balance of the issue the State Treasurer should issue in lieu of the bonds $1,800,000.00 of bond script, which should state that the money mentioned in the script is due by the State to bearer, and that the script should be received in

payment of taxes and of dues to the State, except a special tax levied to pay the interest on the public debt. By section 4 of the act, the tax collecting officers were required to receive this script in payment of all taxes except the tax to pay interest on the public debt, and the State Treasurer and all other officers were required to receive this script in payment of all debts to the State, and a tax of three mills on the dollar was levied for the purpose of paying this script. When this act went into effect, numerous holders of the bonds guaranteed exchanged them for the script. When this was done, the State by its legislature passed an act in October, 1873, repealing the 4th section of the act of March, 1872, which provided for the levy of an annual tax of three mills on the dollar for the redemption of the script, and forbade the comptroller to levy any tax for any purpose, unless expressly thereafter authorized to do so by statute, and in December, 1873, the legislature of South Carolina passed an act forbidding any State or county officer to accept payment of taxes in this script.

Suit was instituted by certain holders of this script against the Comptroller General of South Carolina, the Treasurer of the State, and the treasurers of certain counties in the State, the purpose of the suit being to compel the State of South Carolina, through its proper officers, to carry into effect the provisions of the Act of 1872, to permit the payment of taxes due the State by the tender of this script, to compel the redemption of one-fourth of this script each year, to compel the levy of the tax provided for by section 4 of the Act of 1872 to pay this script, and to enjoin the county treasurers from refusing to receive the script in payment of taxes, and to enjoin them from selling any property for taxes belonging to those who tendered script in payment of taxes, the contention of plaintiffs being that the Act of

1872 authorizing the issue of the script and the levy of a tax for its payment was a contract between the State of South Carolina and the script holders, and that the subsequent legislation by which the Act of 1872 was rendered nugatory, was an impairment of the obligations of the contract entered into between the State and the script holders under the Act of 1872, and that said act so impairing the obligation of contract was void and not enforceable and not binding on the officers of the State, and should be disregarded by them.

Upon final hearing, the district court sustained the contention of the petitioners and referred the case to a special commissioner for the purpose of ascertaining the amount of this script outstanding, and when this was done, directing that proper process should be issued against the State Treasurer of South Carolina and his successors in office, compelling him and them to comply with the Act of 1872, and compelling the Comptroller General and his successors in office to perform the duties enjoined on that officer by the Act of 1872, and requiring all officers of the State of South Carolina affected, to discharge such duties as were required of them by the Act of 1872, and the State of South Carolina was given option to be made a party to the proceedings if it thought proper.

From the decrees of the circuit court, the appeals were prosecuted to this court. The question was directly raised that the suits were suits against the State of South Carolina, and prohibited by the 11th amendment to the Constitution of the United States. In discussing this question, the court uses the following language:

"The controversy in which the validity and obligation of the script are involved is the subject of the present suits. The complainants as holders of this script, in behalf of themselves and of all other holders choosing to take part, are seeking to obtain by judicial process

its redemption by the State, according to the terms of the statute in pursuance of which it was issued, by the levy, collection and appropriation of special taxes pledged to that purpose, as they claim, by an irrepealable law, constituting a contract protected from violation by the Constitution of the United States. And such are the decrees which have been rendered according to the prayer of the bills. These suits are accurately described as bills for the specific performance of a contract between the complainants and the State of South Carolina, who are the only parties to it. But to these bills the State is not in name made a party defendant, though leave is given to it to become such, if it chooses; and except with that consent it could not be brought before the court, and be made to appear and defend. And yet it is the actual party to the alleged contract the performance of which is decreed—the one required to perform the decree and the only party by whom it can be performed. Though not nominally a party to the record, it is the real and only party in interest, the nominal defendants being officers and agents of the State, having no personal interest in the subject matter of the suit, and defending only as representing the State. And the things required by the decrees to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the State. The State is not only the real party to the controversy, but the real party against which relief is sought by the suit; and the suit is, therefore, substantially within the prohibition of the eleventh amendment to the Constitution of the United States, which declares that 'The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.'

The case comes thus directly within the authority of Louisiana v. Jumel, 107 U. S. 711 (see Bk. 27, L. ed. 448). It was there said, p. 721 (451): 'The question then is whether the contract can be enforced, notwithstanding the Constitution, by coercing the agents and officers of the State, whose authority has been withdrawn

in violation of the contract, without the State itself in its political capacity being a party to the proceedings. The relief asked will require the officers against whom the process is issued to act contrary to the positive orders of the supreme political power of the State, whose creatures they are and to which they are ultimately responsible in law for what they do. They must use the public money in the treasury and under their official control in one way, when the supreme power has directed them to use it in another, and they must raise more money by taxation when the same power has declared that it shall not be done.' And, p. 727 (454): 'The remedy sought, in order to be complete, would require the court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection and disbursement of the tax in question, until the bonds, principal and interest, were paid in full; and that, too, in a proceeding in which the State, as a State, was not and could not be made a party. It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place. When a State submits itself without reservation to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has by its act of submission allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the courts, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power, in their administration of the finances of the State.'

If this case is not within the class of those forbidden by the constitutional guaranty to the States of immunity from suits in federal tribunals, it is difficult to conceive the frame of one which would be. If the State is named as a defendant it can only be reached either by mesne or final process through its officers and agents; and a judgment against it could neither be obtained nor enforced,

except as the public conduct and government of the ideal political body called a State could be reached and affected through its official representatives. A judgment against these latter, in their official and representative capacity, commanding them to perform official functions on behalf of the State according to the dictates and decrees of the court, as if anything can be a judicial proceeding against the State itself. If not, it may well be asked what would constitute such a proceeding?

In the present cases the decrees were not only against the defendants in their official capacity, but, that there might be no mistake as to the nature and extent of the duty to be performed, also against their successors in office.

The principle which governs in these cases must be carefully distinguished from that which ruled in Osborn v. Bank of the United States, 9 Wheat. 738 (22 U. S. bk. 6, L. ed. 204); Davis v. Gray, 16 Wall. 203 (83 U. S. bk. 21, L. ed. 447); Board of Liquidation v. McComb, 92 U. S. 531 (Bk. 23, L. ed. 623), and Allen v. B. & O. R. R. Co., 114 U. S. 331 (ante, 200), a distinction which was pointed out in Louisiana v. Jumel, *ubi supra*, and in Cunningham v. Macon and Brunswick R. R. Co., 109 U. S. 446 (Bk. 27, L. ed. 992). The rule for such cases was well stated by Mr. Justice Bradley in Board of Liquidation v. McComb, *ubi supra*, as follows: 'A State without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled that when a plain official duty, requiring no exercise of discretion, is to be performed and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it.' And on the other hand, the rule for that class of cases was stated by the Chief Justice in Louisiana v. Jumel, *ubi supra*, in these words: 'The officers owe duty to the State alone, and have no contract relations with the bondholders. They

can only act as the State directs them to act, and hold as the State allows them to hold. It was never agreed that their relations with the bondholders should be any other than as officers of the State, or that they should have any control over this fund except to keep it like other funds in the treasury and pay it out according to law. They can be moved through the State, but not the State through them.' In such cases, as was said by Chief Justice Marshall in Osborn v. Bank of the United States, 9 Wheat. 738, 858 (22 U. S. bk. 6, L. ed. 204, 232): 'The State not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants, whether they are to be considered as having a real interest, or as being only nominal parties.'

A broad line of demarkation separates from such cases as the present, in which the decrees require, by affirmative official action on the part of the defendants, the performance of an obligation which belongs to the State in its political capacity, those in which actions at law or suits in equity are maintained against defendants who, while claiming to act as officers of the State, violate and invade the personal and property rights of the plaintiffs, under color of authority, unconstitutional and void. Of such actions at law for redress of the wrong, it was said by Mr. Justice Miller, in Cunningham v. Macon & Brunswick R. R. Co., *ubi supra*: 'In these cases he is not sued as or because he is the officer of the government, but as an individual; and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him.' Of such cases that of United States v. Lee, 106 U. S. 196 (Bk. 27, L. ed. 171), is a conspicuous example; and it was upon this ground that the judgment in Poindexter v. Greenhow, 114 U. S. 270 (ante, 185), was rested. And so the preventive remedies of equity, by injunction, may be employed in similar cases to anticipate and prevent the threatened wrong, where the injury would be irreparable, and there is no plain and adequate remedy at law, as was the case

in Allen v. B. & O. R. R. Co., 114 U. S. 311 (ante, 200), where many such instances are cited.

The defendants in the present cases, though officers of the State, are not authorized to enter its appearance to the suits and defend for it in its name. The complainants are not entitled to compel its appearance, for the State cannot be sued without its consent. And the court cannot proceed to the determination of a cause and controversy, to which the State is an indispensable party, without its presence. This, however, the circuit court has in fact done; and its decrees undertake to dispose of the matter in controversy, and enforce the judgment of the court against the State through its officers, in a suit to which it is not a party. The suggestion that it has had the opportunity and the invitation to appear is immaterial, for it has a constitutional right to insist on its immunity from suit.

For these reasons the decrees of the circuit court are reversed, and the causes are remanded, with instructions to dismiss the bills of complainant. And it is so ordered."

The Hagood case, as we view it, is similar to the case at bar in principle. In that case it was sought to compel the officers of the State of South Carolina to do certain things which the State only could do, and in which they had no personal interest. In the instant cases, it is sought to compel the appellants, officers of the State of Kentucky, to do certain things which they have no constitutional or statutorial right to do, that is to reduce the assessment of property of appellees below its fair cash value. This power the State did not have, except through amendment of its Constitution. As said in Board of Liquidation vs. McComb, 92 U. S. 531, and quoted with approval in the Hagood case "They (the officers) can be moved through the State, but not the State through them." In the instant cases, the attempt is made to compel this State through the Board of Assessment and Valuation to compel the local assessors

to increase the assessment on property under their jurisdiction, as in the Hagood case the attempt was made to compel the State of South Carolina, through its officers, to redeem the script which it had issued, and over which, under the existing law, the officers sought to be compelled to act, had no control.

Ex Parte Ayers, 123 U. S., beginning on page 443, grew out of a petition for a writ of habeas corpus and prayed for by R. A. Ayers, directed to the United States Marshal for the Eastern District of Virginia, requiring him to show cause why he detained in his custody said Ayers. The response of the marshal was in substance that he held Ayers by virtue of an order of the circuit court of the United States for the Eastern District of Virginia, by which Ayers was sentenced for contempt, in instituting suit against the B. & O. Railway after having been directed not to do so by order of said court.

It appears from the record in that case, that the State of Virginia had issued certain bonds, and it was provided that the coupons attached to the said bonds were receivable in payment of taxes due the State of Virginia. A number of the bonds were sold, and subsequently the State enacted certain legislation the effect of which was to prevent holders of coupons from tendering them in payment of taxes, and directing the Attorney-General of the State to sue those who tendered such coupons in payment of taxes, for the taxes due, as if no such tender had been made. In pursuance of those laws, which were subsequently held unconstitutional, the Attorney-General sued the B. & O. Railway Company for taxes alleged to be due the State of Virginia, after the Railway had tendered coupons in payment of same, and this notwithstanding he had been by order of the United States circuit court, directed not to do. A rule was issued against him for disobeying the order of the circuit

court, and in response to the rule he said that he did so "Because he was thereunto required by the Act of the General Assembly of Virginia, aforesaid, and because he believed this court had no jurisdiction whatever to award the injunction violated." He was thereupon fined and committed to the custody of the marshal until he purged himself of contempt by paying the fine and dismissing the suit against the railroad company. He thereupon petitioned for a writ of habeas corpus, and the case coming on to be heard, the question arose whether or not the suit in which the injunction was awarded was not in effect a suit against the State of Virginia, and prohibited by the eleventh amendment to the Constitution of the United States. In discussing this question, this court says:

"The very object and purpose of the eleventh amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several States of the union invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other States or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed by the eleventh amendment requires that it should be interpreted, not literally and too narrowly, but fairly, to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a State by name, but those also against its officers, agents, and representatives, where the State, though not named as such, is, nevertheless, the only real party against which, alone in fact, the relief is asked, and

against which the judgment or decree effectively operates."

In the cases at bar, the suits instituted in the United States District Court, for the Eastern District of Kentucky are clearly such where the State, though not named as such, is nevertheless the only real party against which, alone in fact, the relief is asked and against which the judgment or decree effectively operates, because the fund, the payment of which is restrained, goes into the coffers of the State, to be there used for State purposes, and not one of the defendants to those actions, appellants here, have any personal interest in that fund.

It was insisted in the Ayers case that the acts of the General Assembly of Virginia, upon which petitioners relied, impaired the obligation of the contract entered into between the State of Virginia and the owners of its bonds. Speaking on this question, the court said:

"Admitting all that is claimed on the part of the complainants as to the breach of its contract on the part of the State of Virginia by the Acts of its General Assembly referred to in the bill of complaint, there is nevertheless no foundation in law for the relief asked. For a breach of its contract by the State, it is conceded there is no remedy by suit against the State itself. This results from the eleventh amendment to the Constitution, which secures to the State immunity from suit by individual citizens of other States or aliens. This immunity includes not only direct actions for damages for the breach of the contract brought against the State by name, BUT ALL OTHER ACTIONS AND SUITS AGAINST IT, WHETHER AT LAW OR IN EQUITY. A bill in equity for the specific performance of the contract against the State by name, it is admitted, could not be brought. In Hagood vs. Southern, 117 U. S., page 52, it was decided that in such a bill, where the State was not nominally a party to the record brought

against its officers and agents, having no personal interest in the subject matter of the suit, and defending only as representing the State, where 'The things required by the decree to be done and performed by them are the very things which, when done and performed, constitute a performance of the alleged contract by the State,' the court was without jurisdiction, because it was a suit against a State.

The converse of that proposition must be equally true, because it is contained in it, that is a bill, the object of which is by injunction indirectly, to compel the specific performance of the contract, by forbidding all those acts and doings which constitute breaches of the contract, must also necessarily be a suit against the State. In such a case, though the State be not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still, in substance, if not in form, a suit against the State."

The cases at bar are actions instituted in the court below by appellees seeking by injunction to forbid the defendants, appellants here, from doing certain acts in the collection of taxes, which they are required to do by the laws of the State, and which are done in conformity to those laws, and which laws are attempted to be enforced by those officials, are not in opposition to any provision of the United States Constitution, and in the enforcement of which laws, the appellants here have no personal interest. Are not those actions under the authority of Ex Parte Ayre, Hagood vs. Southern, suits against the State of Kentucky, in the guise of actions against certain of its officers?

The case of Ex Parte Ayers as referred to in the doctrine quoted above, is in no wise repealed or modified, the suggestion being made that the suit which resulted in the punishment of Ayers for contempt, was in effect a suit to require the State to perform a contract.

Admitting this to be true, the principles therein laid down, are applicable to any suit against the State, either in law or equity, and the immunity guaranteed to the State by the eleventh amendment, can be, and successfully, relied upon in the suit against the State for an alleged tort, as it could be in a suit for breach of contract.

In the district court, the case of Cummings vs. Merchants' National Bank, 101 U. S., page 553, was relied on as authorizing the character of suit brought by appellants. In that case, however, the question here raised that this suit is a suit against the State, was not raised, and it appears that the authority of Cummings vs. Merchants' National Bank has been disregarded in so far as it holds that the statute of the State may enlarge the jurisdiction of the Federal Court sitting in equity. Whitehead vs. Shattuck, 138 U. S. 146; McLaughlin vs. St. L. S. W. Railway Co., 232 Fed., page 579, and in New York, Ex. Rel. vs. Barker, 179 U. S., page 279, in speaking of Cummings vs. Merchants' National Bank, and Albany County Supervisors vs. Stanley, 105 U. S. 305, both of which cases involve the same questions, and the opinions in which were written by the same justice, this court says, "Both these cases related to the taxation of national bank shares, and the question was whether the tax levied violated the provision of the National Banking Act, on that subject." So it appears that any expressions of opinion in Bank vs. Cummings not bearing directly on the right to assess national bank shares at a different valuation from other property, was not relevant to the question involved, and is not binding authority, however forcible the argument may be. It appears to us that, as it is admitted, the section of the State Constitution and the act creating the Board of Valuation and Assessment and defining its

duties, are in no manner in conflict with the provisions of the United States Constitution, and as it is not claimed that the board adopted a method for determining the value of plaintiffs' property, different from that described by the State Constitution, and the laws enacted in conformity thereto, that the act of the board was the act of the State and an attempt to sue the board and enjoin the enforcement of its act, is in substance and effect a suit against the State to prevent its acting, and we cannot understand that there is any difference between suing a State to compel it to act, and suing a State to prevent it from acting. Both come within the prohibition of the eleventh amendment.

APPELLEES HAD AN ADEQUATE REMEDY AT LAW.

In Singer Sewing Machine Company vs. Benedict, 229 U. S., page 481, it appears the machine company, a New Jersey corporation, sought to enjoin in the Federal Court the collection of taxes levied on it by the city and county of Denver, in the State of Colorado. The company made a certain return of its personal property for taxation, and the assessor increased the amount considerably. The company tendered payment of the taxes on the property returned by it, and refused to pay the amount as fixed by the assessment of the assessors. The county treasurer declined to accept the payment offered by the company, and threatened to sue it. Thereupon the company brought suit in the Federal Court, as stated, to enjoin the collection of the tax, for various reasons not necessary herein to set out, but claiming the enforcement of the collection would be violative of certain provisions of the Constitution of the United States. The defendants, who were the treasurer and certain other fiscal officers of the county and city, demurred to the bill on the ground that the bill did not

state a case for equitable relief. The demurrer was overruled and the defendants answered setting up in the answer the objection made in the demurrer. Upon a hearing, the decree was entered dismissing the bill, and the company appealed to the Circuit Court of Appeals. That court held there was an adequate remedy at law, and affirmed the decree. The company then appealed to this court. In discussing the right of the machine company to appeal to equity, and in discussing the case generally the court said:

"In the courts of the United States it is a guiding rule that a bill in equity does not lie in any case where a plain, adequate, and complete remedy may be had at law. The statute so declares, Rev. Stat. 723, U. S. Comp. Stat. 1901, page 583, and the decisions enforcing it are without number. If it be quite obvious that there is such a remedy, it is the duty of the court to interpose the objection *sua sponte*, and in other cases it is treated as waived if not presented by the defendant *in limine*. Reynes v. Dumont, 130 U. S. 354, 395, 32 L. Ed. 934, 945, 9 Sup. Ct. Rep. 486; Allen v. Pullman's Palace Car Co., 139 U. S. 658, 35 L. Ed. 303, 11 Sup. Ct. Rep. 682. There was no waiver here. The objection was made by the demurrer and again by the answer; and so, if it was well grounded, it was as available to the defendants in the Circuit Court of Appeals to prevent a decree against them there as it was in the circuit court. Boise Artesian Hot & Cold Water Co. v. Boise City, 213 U. S. 276.

In the last case it was said of the (485) pertinency of the guiding rule in cases such as this (page 281): 'A notable application of the rule in the courts of the United States has been to cases where a demand has been made to enjoin the collection of taxes or other impositions made by State authority, upon the ground that they are illegal or unconstitutional. The decisions of the State courts in cases of this kind are in conflict and we need not examine them. It is a mere matter of choice of convenient remedy for a State to permit its courts to enjoin the collection of a State tax because it is illegal or unconstitutional. Very different considera-

tions arise where courts of a different, though paramount, sovereignty, interpose in the same manner and for the same reasons. An examination of the decisions of this court shows that a proper reluctance to interfere by prevention with the fiscal operations of the State governments has caused it to refrain from so doing in all cases where the Federal rights of the persons could otherwise be preserved unimpaired. It has been held uniformly that the illegality or unconstitutionality of a State or municipal tax or imposition is not of itself a ground for equitable relief in the courts of the United States. In such case the aggrieved party is left to his remedy at law, when that remedy is as complete, practicable, and efficient as the remedy in equity.'

A statute of Colorado enacted in 1870 (Laws 1870, page 123, No. 106), and embodied in subsequent revenue acts (2 Mills's Anno. Stat. 3777; Laws 1902, pages 146, 202; Rev. Stat. 1908, 5750), declares that 'in all cases where any person shall pay any tax, interest, or costs, or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to erroneous or improper assessment, to improper or irregular levying of the tax, to clerical or other errors or irregularities, the board of county commissioners shall refund the same without abatement or discount to the taxpayer.' This statute imposes upon the county commissioners the duty of refunding, without abatement or discount, taxes which have been paid and are found to be illegal, and confers upon the taxpayer a correlative right to enforce that duty by an action at law. As long ago as 1879 the supreme court of the State, in holding that the invalidity of a tax afforded no ground for enjoining its enforcement, said of this statute: 'Against an illegal tax, complainant has a full and adequate remedy at law; and we see no reason why in this case he should not be remitted to that remedy.' Price v. Kramer, 4 Colo. 546, 555. And again: 'The statute furnishes another remedy in such cases which is complete and adequate.' Woodward v. Ellsworth, 4 Colo. 580. And that this view of the statute still prevails is shown in Hallett v. Arapahoe County, 40 Colo. 308, 318, 90 Pac. 678, decided in 1907, where, in refusing equitable

relief against the collection of taxes alleged to be illegal, the court said: 'By 3777, 2 Mills's Anno. Stat., it is provided that taxes paid which shall thereafter be found to be erroneous or illegal shall be refunded, without abatement or discount, to the taxpayer. No statement appears in either of the complaints from which it can be deduced that the remedy afforded the plaintiff by this section is not adequate.

We refer to these cases, not as defining the jurisdiction in equity of the circuit court, for that they could not do (Payne v. Hook, 7 Wall. 425, 430; Whitehead v. Shattuck, 138 U. S. 146; Smyth v. Ames, 169 U. S. 466, 516), but as showing that the Colorado statute gave to one who should pay illegal taxes a right to recover back from the county the money so paid. This right was one which could be enforced by an action at law in the circuit court, no less than in the State courts, if the elements of Federal jurisdiction, such as diverse citizenship and the requisite amount in controversy, were present. Ex Parte McNeil, 13 Wall. 236, 243; United States Min. Co. v. Lawson, 67 C. C. A. 587, 134 Fed. 487, 769, 771. Thus it will be perceived that, if the taxes in question were illegal and void, as asserted, the company had a remedy at law. It could pay them, and, if the commissioners refused to refund, have its action against the county to recover back the money. Such a remedy, as this court often has held, is plain, adequate, and complete in the sense of the guiding rule before named, unless there be special circumstances showing the contrary. Dows v. Chicago, 11 Wall. 108 112; State Railroad Tax Cases, 92 U. S. 575, 613, 614; Shelton v. Platt, 139 U. S. 591, 597; Allen v. Pullman's Palace Car Co., 139 U. S. 658, 661; Indiana Mfg. Co. v. Koehne, 188 U. S. 681, 686.

But it is said that in an action to recover back the money, the tax list would be treated as the judgment of a special tribunal, conclusively determining all questions in favor of the validity of the tax. It well may be that, if the list were regular on its face, it would be presumptive evidence that the tax was valid, but we find nothing in the statutes of Colorado or in the decisions of its supreme court, which goes to the length suggested. The

plain implication of the section providing for repayment is otherwise. Another section (Rev. Stat. 5677) declares that the tax list 'shall be prima facie evidence that the amount claimed is due and unpaid,' and the only decision cited by the company speaks of the assessment as being presumptively right 'in the absence of any evidence to the contrary.' Singer Mfg. Co. v. Denver, 46 Colo. 50, 103 Pac. 294.

It also is said that there were special circumstances calling for equitable relief, in that the act of the assessor in making the additional assessment without giving any notice of it was necessarily a fraud, an accident, or a mistake. No such claim was made in the bill, and even had it been, it would be unavailing unless founded upon something more than the charge that no notice was given, and that the company had no property within the city and county other than that returned by it. We say this because the fraud, accident, or mistake which will justify equitable relief must be something more than what is fairly covered by the charge here made, for otherwise the well-settled rule that mere illegality in a tax affords no ground for such relief would be a myth. There really would be no case in which the illegality could not be said with equal propriety to be the result of fraud, accident, or mistake, for it always arises out of some deviation from law or duty.

Concluding, as we do, that the company had a plain, adequate, and complete remedy at law, the decree dismissing the bill is affirmed. See also Shelton vs. Platt, 139 U. S., page 591."

In the cases at bar, the appellants and EACH made a motion to dismiss each case, among other grounds on the following: "If the thing of which plaintiff complains should be true, plaintiff has an adequate remedy at law," third ground of motion to dismiss, see page 18 of transcript of record. Section 162 of the Kentucky Statutes has been continuously in force from 1893 up to and including the present time. Said statute reads as follows:

"*Taxes Wrongfully Collected Refunded.*—When it shall appear to the Auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the treasury for such money so improperly paid, in behalf of the person who paid the same. Nothing herein contained shall authorize the issuing of any such warrant in favor of any person who may have made payment of the revenue tax due on any tract of land, unless it is manifest that the whole of the tax due the Commonwealth on such land has been paid, independent of the mistaken payment, and ought to be reimbursed."

This statute has been construed by the Kentucky Court of Appeals in the case of Bank of Commerce vs. Stone, 108 Ky. 427, and its provisions enforced. The resemblance of this statute to the Colorado statute referred to in Sewing Machine Co. vs. Benedict, *supra,* is striking. That statute reads as follows:

"In all cases where any person shall pay any tax, interest, or costs, or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to erroneous or improper assessment, to improper or irregular levying of the tax, to clerical or other errors or irregularities, the board of county commissioners shall refund the same without abatement or discount to the taxpayer."

It appears to us the case of Singer Sewing Machine Co. vs. Benedict, *supra,* is conclusive of the instant cases, so far as any tax due the State is concerned. The remedy there provided was not sought to be enforced, to recover the State tax before those proceedings were instituted. It may be contended that section 162 was not applicable to taxes levied for county and municipal purposes, that as to taxes paid for those purposes appellee would be without remedy, and as the suit could be maintained against certain State officers to prevent their certifying the amount of taxes due the county,

municipality and other tax districts independent of the State tax, that a bill in equity could be maintained to enjoin such certification and the bill maintained for one purpose could be maintained for all purposes. We do not think such position tenable. The tax due the State is one thing; the tax due the counties and municipalities and taxing districts is another thing. It does not at all follow because the same officers have certain duties to perform with relation to both classes of taxation, that where an adequate remedy at law is provided for one class of taxation, that remedy may be ignored because it does not apply to both classes, yet that is the position taken by appellees in the lower court.

The case of Coulter, Auditor vs. Weir was decided by the Circuit Court of Appeals, 6th Circuit, on February 13th, 1904, Judge Lurton delivering an opinion which is found 127 Fed., beginning on page 897. In this case, Weir, as president of the Adams Express Company, attacked an assessment made by the State Board of Valuation and Assessment, of the franchise of his company, and sought to enjoin the collection of so much of the tax upon this assessment as was due the State of Kentucky. The suit was filed in the Circuit Court of the United States for the Eastern District of Kentucky, and the contention of plaintiff was sustained, and an appeal taken to the Circuit Court of Appeals. In passing upon the right of the court to enjoin the collection of the tax due the State under this assessment, it was said on pages 906 and 907 of opinion:

"To enjoin the defendant from collecting or attempting to enforce the payment of this tax would be manifestly fruitless, unless the decree is to affect and conclude the State. The decree appealed from did not stop with an order commanding the defendant to take no other or further step under the law, because he had under the law no other or further duty in connection with

the matter, but adjudicated the amount due under a legal assessment, and undertook to annul the assessment in excess of that sum. The court in this exceeded its jurisdiction, for jurisdiction over the defendant did not give it jurisdiction over the State of Kentucky, as the decree seems to assume."

And again in Coulter, Auditor vs. Louisville & Nashville Railroad Co., 196 U. S., beginning on page 599, where an assessment of the franchise of the railroad company by the Board of Valuation and Assessment of Kentucky was attacked, the Circuit Court of the United States for the Eastern District of Kentucky sustained the contention of the railroad company, which was that the franchise of the corporation was assessed at a higher rate than other property, and enjoined the State officers from certifying to the tax collecting officers of the various counties through which the railroad ran, the amount of tax due each county as required by law, and also enjoined the collection of the tax due the State. This court, in passing upon the latter question, said:

"We need not stop to show that so much of the bill as seeks an injunction against collecting the State tax, and the portion of the decree which orders a receipt to be executed on the part of the State, can not be maintained. See Coulter vs. Weir, 62 C. C. A. 429, 127 Fed. 897-906-912."

The authorities quoted, we take it, are conclusive of this question.

In the opinion of the judge of the District Court for the Eastern District of Kentucky, in case of Louisville & Nashville Ry. Co. vs. Bosworth, 209 Fed., beginning on page 380, on pages 404 and 405, the court refers to sections 144, 145 and 152 Kentucky Statutes, as authority for his conclusion that the payment of the part of the taxes going to the State could be enjoined.

We confess we do not see the application of those sections, which are here inserted:

"§ 144. *Accounts of Receipts and Expenditures—How Kept.*—He shall keep a separate account of all taxes collected, so as to exhibit the amount collected under each law. He shall keep a correct list of all balances due by the Commonwealth to individuals, and by individuals to the Commonwealth. He shall keep an account of all claims of debt or credit which may exist between the general government and this State, and between this State and any other State; and an account between the Commonwealth and all her civil officers whose salary or wages are payable out of the treasury; the compensation to members of the General Assembly and the officers thereof, an account of which is to be kept in separate books by the clerk of House, certified and deposited with the Auditor.

§ 145. *Duty of Auditor and Attorney General Concerning Claims—Costs.*—He shall audit and enter in account all other demands payable at the treasury; all accounts of the collection of the revenue or other tax or public money, and of all public debts. All public officers or public debtors who fail to render their accounts at the proper time, or to pay the money in their hands due the Commonwealth into the treasury, the Auditor shall report to the Attorney General, and cause proceedings to be instituted against them, and the Attorney General shall prosecute and enforce the performance of such duty and the payment of the money into the treasury. If, upon any such judicial procedure, it shall appear that nothing is due the Commonwealth, the defendant shall, nevertheless, pay the cost.

§ 152. *Authority to Treasurer to Receive Money.*—He shall grant written authority to the Treasurer to receive money from public officers, or other persons, due to the Commonwealth, stating the person, the amount to be paid in, and on what account paid, and charge the same to the Treasurer, in an appropriate book, under its proper head."

The judge who delivered the opinion in the Bosworth case, delivered the opinion in all the franchise tax cases, now before this Court on appeal.

APPELLEE IF AGGRIEVED HAD ANOTHER AND MORE EQUITABLE REMEDY THAN THE ONE IT SOUGHT.

We assume that if one is aggrieved and has two equitable remedies, one of which affords substantial justice and is more in accord with the law than the other, that remedy must be pursued to the exclusion of the other. In the instant case it is sought by appellee to reduce the assessment of its franchise below its fair cash value, for the reason it says that other property in the State is assessed below its fair cash value, by the county assessors, and therefore it is required to pay upon a proportionally higher assessment, and that justice can only be done it by reducing its assessment below the constitutional requirement, in order that its property may be equalized for assessment with the property of other taxpayers. Now, if the law provides a method by which, instead of lowering the property of appellee, it can by proper procedure compel the assessment of the property of other taxpayers to be increased so as to come within the constitutional requirement of an assessment upon the fair cash value of that property, then, as we view it, it is the duty of appellee to adopt that method, and that method is provided for under the laws of Kentucky, by virtue of sections 4115 to 4120, inclusive, which are stated in full on page fifteen of this brief.

A State Board of Equalization and Assessment is created and its duties defined by section 4268 Kentucky Statutes. It is made the duty of the Governor of the State to annually appoint one person for each appellate district of the State, and they with the Auditor of Pub-

lic Accounts constitute a State Board of Equalization and Assessment. There are seven appellate districts in the State, so eight persons constitute this board. By section 4271, the board is required to meet at the State capital on the tenth day of February in each year, to begin the discharge of the duties imposed upon it, but if at that time the Auditor has not received the necessary information to present to the board, he may postpone the meeting to some later date.

By section 4273, the clerks of the various county courts of the State are required to make out an annual statement of all sales of real estate, giving the price paid, with terms and conditions, the number of acres, and the assessed value of same for the year, and in addition to this, by said section, the board "Shall have authority to obtain and use any other evidences as to values."

By section 4274, it is among other things provided, "The said Board of Equalization shall fix the percentage of assessed value of real property at its fair cash value, and all counties whose average lists of real property fall below such value shall be raised to the same, and all those counties whose average lists are above the same shall be lowered to said cash value."

It is the duty of the secretary of the board to report to the various county judges of the State, as soon as possible, the action of the board in regard to respective counties, whereupon said judges may appoint not exceeding five witnesses to appear under oath before the board in reference to its action, and the board shall revise its action or not, as it thinks proper.

By section 4275, it is provided that the personal property of every county shall be equalized by adding to or subtracting from the list of personal property the same per centum as was added to or subtracted from the list of farm lands for the county, and there are

numerous other sections relating to this subject, all of which material to the question in hand are hereinbefore set out.

The constitutionality and construction of the act creating the Board of Equalization and Assessment were considered by the Court of Appeals in the case of Ray, etc. vs. Armstrong, etc., reported in 140th Ky., beginning on page 800, and the act was held constitutional, and in discussing the act, the court uses the following language:

"A brief outline of the provisions of the statute at this point will aid in its study.

In its subtitle the act denominates this board the 'State Board of Equalization.' Section 4268 provides for the membership, and adds 'they shall constitute a State Board of Equalization and Assessment.' Section 4274 (Kentucky Statutes) speaks of it as 'The said board of equalization.' Section 4275, Ibid., uses the same term. Section 4278 says: 'When the board shall have completed its equalization of assessments for any one year,' etc. Sections 4279, 4280 and 4281 speak of the board as the State Board of Equalization. In the whole article there appears but once an expression indicating that the power of the board is other than that of equalizing assessments, which is in section 4280, wherein it is said:

'All rates of taxes as herein provided for shall be extended by the secretary on the assessed valuation of the property as equalized and assessed by the State Board of Equalization.'

A careful study of the whole article leaves no doubt in our minds that the scheme is one of equalization, taking the standard provided by the Constitution of the State as a basis. It is not alone, as was a former act, to equalize values as among the counties. It is to equalize the counties, it is true, but to equalize them by the standard of the Constitution.

The various county clerks, who are the custodians alike of the assessment books and of the record conveyances of real estate, are required to furnish for the

use of the board a list of all conveyances of real property in their counties within the year prior to September 1st, showing particularly the consideration named in the conveyances, and the assessed value of the same properties on the assessor's books for the corresponding year. (Section 4273, Kentucky Statutes). By section 4274 the board is required to 'Fix the percentage of the assessed value of real property at its fair cash value.' By section 4277, Ibid., the board must find 'the average percentage of assessed value to cash values of lands and town lots in any one county by taking in said tabulated statement the aggregate assessed value of all tracts of land and town lots, town lots being kept separate, and calculating what percentage said aggregate assessed values are of the cash values of the same, time payments being reduced to cash value on the basis of six per centum discounts.' The scheme is one of equalization. The plan is to bring all property in the State to a fair cash value standard, the surest method possible of attaining 'equality and uniformity,' so much harped on by critics of all taxing systems. The Constitution requires that all property be assessed 'at its fair cash value, estimated at the price it would bring at a fair voluntary sale.' (Section 172, Constitution). All the machinery for assessing property for taxation looks to that result. The county assessor is sworn to so assess the property. In the section of the Constitution just cited he is subjected to severe penalty for willfully failing to so assess it. The taxpayer is sworn to list his property on that basis, the assessor is required to reject the taxpayer's valuation if it is not on that basis, and to so value it himself; the county board of supervisors are appointed for the purpose mainly and are likewise charged to revise and correct assessments so as to attain that standard. Yet with all that the bald truth is, as everybody knows, it is not generally done. The Legislature has attempted to meet the situation. For what purpose? Merely to equalize assessments among the counties, so that an average of valuation would be attained throughout the State. That was the purpose of the Act of 1884, undoubtedly. But the Constitution of 1891, and its positive requirements

on the subject, made it necessary to enlarge the scope of the legislation. An act was passed in 1890 requiring the State Board of Equalization to equalize all property on a basis of 70 per cent. of its actual or cash value. This court held in Louisville Ry. Co. v. Commonwealth, 105 Ky. 710, that the new Constitution repealed that act. Then it was that the present statute was passed, in which it was provided that the basis of equalization should be the fair cash value of the property assessed, not the average assessed value, nor any other per cent. of the cash value. The State has found it to be necessary in order to accomplish the purpose of the Constitution, to provide not only the county assessors, and the county board of supervisors, who go minutely into each list and search the taxpayer's conscience, but to establish in addition a board less subject to local influences, to sit at the seat of government, and then taking a careful survey of the whole taxable property of the State as returned to the State Auditor, to fix a valuation upon the whole property by counties that will satisfy the requirements of the Constitution. But, from the very nature of the case, such a board could not know the prevailing market prices of all property in each of the 120 counties of the State, nor would it be practicable perhaps to hear great numbers of witnesses for each. The Legislature, taking the cue from the Constitution, has adopted for the guidance of the board a criterion for measuring, for ascertaining, what is the fair cash value 'estimated at the price it would bring at a fair voluntary sale,' of the property which had been assessed. Men may well differ as to the market value of a thing which has not been sold. It is a matter of opinion. But when it has been sold, at a voluntary sale, it is no longer a matter of opinion, but is a settled fact. The 'fair cash value, estimated at the price it would bring at a voluntary sale' of a particular piece of property which has just been sold at such a sale is the price it brought. Such is the common sense view of it; and such is the fact. Then turning to the assessment of the same property, it will be discovered whether that same value was placed upon the property in the assessment. There is but one class of property the

sales of which are required to be recorded. That is real estate. Therefore, that class only furnishes evidence, not provided alone for assessing purposes, but where other motives will probably outweigh and control so as to have the real transaction disclosed in the great majority of instances, evidence of the most believable kind as showing fair cash or market values. If all the real property in a county should change ownership in a year, it would show with reasonable accuracy the fair cash value of all the real estate in that county. But it is not likely that that will ever occur. Still, that which in fact was sold at fair voluntary sale shows what the state of market is. Market values are always fixed by what is sold, not by what is not sold. Thereupon, that which is sold fixes beyond doubt its own fair cash value, and fixes with equal certainty, in legal intendment, the fair cash value of all such property 'estimated at the price it would bring at a fair voluntary sale.' If that which was sold, and of which the conveyance truly shows the consideration, shows uniformly a difference between selling value and assessed value, it is a reasonable inference that that which was not sold but assessed was assessed at the same ratio of value. Here and there will be a man who will give his property in at its cash value. But the general course is, to list one's property on the same basis that his neighbors list theirs. For they know, just as the appellees here do, that if they are assessed on actual values, while others are assessed at less, they will bear proportionally a greater share of the public burden than they should. They feel forced to the expedient of adopting the average scale of values, for self protection. They attempt to create the result by so placing values on their lists, that appellees are seeking by this suit to attain. The Legislature adopted real estate values as the standard of evidence of all values. It is not only more easily ascertained from public records what such values are, but they fluctuate less radically, are more uniform in their stability. It, therefore, affords a more certain standard of market values in general than any other species of property. But why farm lands instead of town lots? It is not, as appellees suppose, and as is

intimated in the arguments, out of partial regard for the agriculturists. In this State farm lands are the main basis of wealth, constituting the greatest portion of all the property in the State. They are affected less in values by artificial conditions than is city or town property. Their values are, therefore, less speculative, and they afford, for that reason, a more certain evidence of a probably uniform value throughout the year than other real estate subjected to more artificial influences, and more violent fluctuations. Still the selling values of town lots are required to be reported to the board just as the sales of farm property are. The lists are to be used to enable the board to determine what is the proportion of selling value to assessed value of lands, as furnishing a basis for determining what was the probable proportion of selling and assessing values of all other properties. The values of town lots are not to be excluded in settling upon the proportion of assessed and selling values of other lands. They are to be considered as throwing some light on that, as they doubtless do in fact."

From this decision of the Court of Appeals, it is manifest that the intention of the Legislature was to establish a board which had supervision over the county assessors, and which would equalize the property assessed according to the standard provided by the Constitution. The following language of the opinion sustains that view:

"A careful study of the whole article leaves no doubt in our minds that the scheme is one of equalization, taking the standard provided by the Constitution of the State as a basis. It is not alone, as was a former act, to equalize values as among the counties. It is to equalize the counties, it is true, but to equalize them by the standard of the Constitution."

After referring to the fact that the Act of 1890 requiring the board to equalize property on the basis of seventy (70%) per cent. of its cash value, and that the

Court of Appeals of Kentucky held the Act of 1890 repealed by the new Constitution, the opinion says:

"Then it was that the present statute was passed, in which it was provided that the basis of equalization should be the fair cash value of the property assessed, not the average assessed value, nor any other per cent. of the cash value."

So undoubtedly the Board of Equalization and Assessment has the power and it is its duty under the law to equalize the property in each county assessed by the county assessor at its fair cash value, the constitutional requirement, and it is the duty of the board to determine from the records submitted to it, and it is also given by section 4273, "Authority to obtain and use any other evidence as to values." That is, the board has the power to raise or lower the property as a whole in each county, according as it is above or below the fair cash value; it is not permitted to raise or lower individual assessments.

Now, it being the duty of the board to determine the fair cash value of the property in the county as a whole, and to so equalize it for assessment, it appears to us the appellee has a perfect remedy by requiring, by mandatory proceedings if necessary, the State board to raise the valuation of each county to a fair cash value standard. In other words, to illustrate, if a county is returned by the county assessor at an assessment of $1,000,000.00 and the board from its investigation is of the opinion that the fair cash value of the property in the county is $1,500,000.00, it is the duty of the board to raise the assessment in that county so its assessment would be $1,500,000.00, and so with each county in the State. If the board fails to equalize the property by raising it to its fair cash value, then the board has not done its duty, and if the board does not do its duty, and

the result is that the property assessed by the county assessors and passed upon by this board is assessed at a less value than its fair cash value and the franchises assessed by the Board of Valuation and Assessment are assessed at their fair cash value, then the discrimination charged in petition is accomplished, and surely if the court has the power to compel the Board of Valuation and Assessment to reduce its assessments below the constitutional standard in order to equalize those assessments with the assessments made by the county assessors, the same court would have the power to compel the State Board of Equalization to raise the assessment in each county so as to arrive at the fair cash value of the property as the Constitution requires.

If this is done, all property will be taxed at its fair cash value, and no one can complain. We again repeat, if the unjust discrimination complained of gives the court the right to reduce the assessments of franchises, the same unjust discrimination would give the court the power to increase the assessment of property under-assessed. By doing this, justice would be done all the parties, and the constitutional requirement complied with. By the plan adopted by appellees, justice is done no one, and the constitutional requirements are violated; therefore it seems to us too plain for argument that if a fair and constitutional result can be obtained by one method, and an unconstitutional result is obtained by another method, it is the manifest duty of those seeking a method to adopt that method which is constitutional and equitable.

It will not do to say that it would be impossible to introduce proof to show that the county assessors have under-assessed the property under their jurisdiction and that enormous expense and insurmountable difficulties would be met in such an attempt, because the records of the cases heard together with this case show

that such an attempt was made and such testimony produced, and the testimony was satisfactory to the district court which tried the cases, because it held that upon the testimony produced the county assessors had habitually under-assessed property in their jurisdiction at least forty (40%) per cent.

If the appellee and those interested with it in reducing the assessment of franchises for taxation had taken the other course and instituted suit to compel the State Board of Equalization and Assessment to raise the assessment of the various counties to the constitutional standard, the fair cash value, and the same proof was introduced in that action as was introduced in the instant cases, can it be said that the court would not hold the proof sufficient to maintain the charge of under-assessment, and would it not have directed the State Board of Equalization and Assessment to convene and raise the various counties to their fair cash value? We concede very readily that this procedure would not meet with the approval of appellees, because while it would result in an equitable assessment for taxation, and the payment of taxes upon the same assessment by all property in the State, yet it would result in an increased amount to be paid by way of taxes by appellees, which is the very thing they do not want to do, and therefore the remedy here suggested has not been adopted or attempted by them, yet certainly they should be required to, by proper procedure in the State court or the Federal court if necessary, and it has jurisdiction, to compel the board to equalize the various county assessments so the fair cash value should be arrived at, rather than attempt to cut down the assessments below their real cash value.

In said Board of Equalization vs. People, etc., 191 Ill., beginning on page 528, which was a case involving the right of a court to compel the State Board of Equalization of Illinois to increase the assessments on certain

corporations, the Supreme Court of Illinois uses the following language:

"We have repeatedly held that an assessment may be impeached on the ground that property has been fraudulently assessed at too high a rate. In Pacific Hotel Co. v. Lieb, 83 Ill. 602, we say (page 609): 'Where * * * the valuation is so grossly out of the way as to show that the assessor could not have been honest in his valuation—must reasonably have known that it was excessive—it is accepted as evidence of a fraud upon his part against the taxpayer, and the court will interpose.' And in Chicago, B. & Q. R. Co. v. Cole, 75 Ill. 591 (on page 594): 'Valuations must be the result of honest judgment, and not of mere will.' The converse of the proposition must be true, and an assessment may be impeached where the assessment has been fraudulently made at too low a rate."

The litigation growing out of the assessment made by the Illinois State Board of Equalization under the judgment of the Illinois Circuit Court resulted in the opinion of Raymon vs. Chicago Union Traction Company, 207 U. S., beginning on page 20.

As said in the Illinois case, if assessments can be impeached "on the ground that property has been fraudulently assessed at too high a rate" the converse of the proposition must be true, and an assessment may be impeached where the assessment has been fraudulently made at too low a rate. That is appellants' contention here, that if the assessments made by the county assessors and passed upon and equalized by the State Board of Equalization are at too low a rate, the State board can be compelled to increase the rate. We apprehend the word "Fraudulently" used in the Illinois opinion does not refer to an intentionally wrongful act, but means that the act of the board was so different from that which the facts authorized that it was in legal contemplation fraudulent, so the act of

the State Board of Equalization in not increasing the assessments of the various counties to their fair cash value was in legal effect fraudulent.

In McDougal, etc. vs. Mudge, etc., 233 Fed., page 235, an opinion by the Circuit Court of Appeals, eighth circuit, which involves the right of the Federal court to enjoin the collection of certain taxes against the Chicago, Rock Island & Pacific Railway Company claimed to be due in St. Francis County, Arkansas, because the property of the railroad company had been discriminated against in the value placed upon it for taxation as compared to the value placed upon other property in the same county for taxation, it appears that in Arkansas the property of railroad companies and certain other corporations is assessed by a State tax commission, and the valuation is apportioned among the various counties. There property in the county is valued by local assessors and the county boards of equalization pass upon those assessments, and the State Tax Commission acts as a State Board of Equalization, with jurisdiction over the aggregates of local valuations as equalized by the county boards.

It will be seen that the State Tax Commission has substantially the same powers as the Kentucky State Board of Equalization, and also the powers of the Kentucky State Board of Valuation and Assessment. The district court granted an injunction against the tax, and the tax collector appealed. In discussing the question involved, the Circuit Court of Appeals, through Hook, circuit judge, used the following language:

"The Constitution of Arkansas provides that all property shall be taxed according to its value, and that no one species subject to taxation shall be taxed higher than another of equal value. Article 16, No. 5. Nevertheless it was a custom in that State for the local officials to extend upon the assessment rolls but 50 per

cent. of the ascertained true value of the property locally assessed. The State tax commission yielded to the custom by certifying down a like per cent. of the valuations of railroad and other corporate property they assessed. In 1914, after the valuation so reduced by the State tax commission had been certified down and extended on the assessment rolls, and after the other property in St. Francis county had been locally assessed on a like basis, the county board of equalization cut in two the local valuations, leaving those certified untouched. The result of this was that the property of plaintiff and other corporations similarly situated was assessed and taxed at half its value, while all other real and personal property in the county was assessed and taxed at but a quarter of its value. The plaintiff, offering to pay taxes on the latter basis, brought this suit to enjoin the excess. The defendant moved to dismiss the bill of complaint on a number of grounds, one of which was that plaintiff had not availed itself of the statutory remedies for the correction of the wrong asserted. The motion does not seem to have been passed upon; but, if it was well taken, the bill of complaint should have been dismissed, and that result can be directed on appeal.

(I) If the practice of assessing on a basis of 50 per cent. of the true value were carried out uniformly as to all subjects of taxation in the State, a property owner could not justly complain of discrimination against him, but what was done in St. Francis county discriminated, not only against the owners of property there which was not embraced in the local reduction, but against the owners of all taxable property elsewhere in the State. It remains, however, to consider the appropriate remedy. The State tax commission, created by an Arkansas statute (Laws 1909, page 764), was given comprehensive powers in aid of its functions as a board of equalization 'to the end that all assessments on property, privileges and franchises in the State shall be made in relative proportion to the just and true value thereof, in substantial compliance with the law.' When sitting as a State board of equalization it acted, not only upon its own direct valuations of railroad and other corporate property, but also upon

the valuations of all other property established or confirmed by the county boards of equalization. As to the latter its power was exercised upon the aggregate valuations by way of addition to or deduction from totals. As a board of equalization they were to 'examine and compare the returns of the assessment of property in the several counties of the State and proceed to equalize the same, so that all the taxable property in the State shall be assessed at its true value and that all property shall bear its equal and just proportion of the taxes of the different counties of the State.'

We think that in performing their duties the State Board of Equalization were authorized to bring the equalized valuations of the county boards into comparison with their own valuations of railroad property. In no other way could the manifest intent of the legislation as to State-wide equality and uniformity be secured. We also think the clear legislative intent was that the State Board of Equalization should be a primary administrative tribunal for the hearing and correction of complaints like that made in this case, and that with such an expeditious and effective remedy at hand a complainant cannot ignore it if he desires redress. Such a complaint in this case would doubtless have resulted in a correction of the discrimination—very probably in the vacation of the unauthorized action of the county authorities. An injunction by a court in the first instance would not completely correct the wrong complained of, but would simply add the plaintiff to the number of taxpayers illegally favored. Of course a person is not to be denied a judicial remedy because others similarly situated do not seek it; but where a statute provides a simple administrative method of correcting discriminations in assessments and of securing uniformity throughout the State it should be tried out before a resort to a Federal court of equity. That is the prevailing rule in the courts of the United States.

Counsel cites Bank of Jonesboro v. Hampton, 92 Ark. 492, 123 S. W. 753, to the effect that the State board has no power to equalize individual assessments. But individual assessments within the meaning of that decision are the valuations made by the local assessors upon which the county boards of equalization have al-

ready acted. When such assessments come before the State board, they then meet those of railroad and other corporate property with which they have not before been compared by competent authority. As already observed, the State board takes the local results by county or subdivisional aggregates, not by individual constituent units, and we think that when so taken they may be compared, not only with similar returns from other counties, but with the valuations made by the State tax commission of the class of property within their cognizance. A contrary construction is not required by the letter or spirit of the statute and would open wide the door to discrimination."

This case seems to us to be very much in point in this, that if the railroad in Arkansas was required to appeal to the State Tax Commission for the purpose of having the assessments of the various property in the State equalized, in order that justice might be done all taxpayers, then it seems equally clear that appellees in this case should have appealed to the State Board of Equalization to have it raise the assessments of the property in the various counties made by the local assessors, to its fair cash value, and if the Board of Equalization refused this request, then to institute proceedings to compel it so to do, and as heretofore said, undoubtedly if the court has the power to reduce the assessments below the constitutional standard, it would have power to increase the assessments to the constitutional standard, and where two remedies are provided, that which gives the relief more in accordance with equity and justice should prevail.

In Boise Artesian Hot & Cold Water Co. vs. Boise City, 213 U. S., beginning on page 276, which was a case where the company sought to enjoin the enforcement of an ordinance requiring the monthly payment of a license of three hundred dollars, for the privilege to lay and repair water pipes in the streets and alleys of

the city, in discussing the right to appeal to the courts to enjoin the collection of such license or tax, this court said:

"It is a mere matter of choice of convenient remedy of a State to permit its courts to enjoin the collection of a State tax, because it is illegal or unconstitutional. Very different considerations arise where courts of a different though paramount sovereignty interpose in the same manner and for the same reasons. An examination of the decisions of this court shows that a proper reluctance to interfere by prevention with the fiscal operations of the State government, has caused it to refrain from so doing in all cases where the Federal rights of the persons could otherwise be preserved unimpaired."

In the instant cases, the rights of all persons could be preserved unimpaired by compelling the State Board of Equalization to increase the assessments by the local assessors in the various counties so the aggregate property in the county should be valued for taxation at its fair cash value, and in doing this there would be no interference with the fiscal operations of the State government and the Federal rights of all parties would be preserved.

IF THE ASSESSED VALUATION OF APPELLEES' FRANCHISES IS NO GREATER THAN THE FAIR CASH VALUE OF SAME, APPELLEES HAVE NO GROUND OF COMPLAINT.

It is conceded in the pleadings of appellees that the assessed value of their franchises does not exceed the fair cash value of same; their only complaint being that other property is assessed for taxation at less than its fair cash value. In other words, appellees say, "We

pay no greater amount of taxation than the law requires us to pay, but other propertyholders pay a less amount of taxes than the law requires them to pay, therefore we should not pay upon the fair cash value of our property." To put it in another form, the complaint is, "We admit we owe the sum charged against us, but other persons who owe a like amount are not required to pay in full, therefore we should not be required to pay in full."

While, in a certain sense, a tax is not a debt, yet it is an obligation due from a citizen to the Commonwealth for the protection the Commonwealth affords him and his property. If he receives the protection guaranteed, he should pay the price stipulated for that protection, and because other persons do not pay their obligation in full, is no legal or equitable excuse for his evading his obligation.

This identical question was before the Court of Appeals of Kentucky in the case of the Lou. Ry. Co. vs. Commonwealth, reported in 105 Ky., beginning on page 710. It was an action by the Commonwealth to recover from the railway company taxes due upon an assessment of its franchise. One of the defenses was that the county assessors and other assessing officers assessed other property at less than its fair cash value, and as its property was assessed at its fair cash value, there was a discrimination against it, and its assessment should be reduced below its fair cash value so as to equalize its assessment with the assessment of other property. The Court of Appeals of Kentucky, on pages 718, 719, 720 and 721, spoke as follows:

"The contention of counsel for appellant is to the effect that, if other officers of the State disregard the constitutional provision and the statutes requiring them to assess property at its fair cash value, the courts

should adjudge that the action of the Board of Valuation and Assessment in assessing franchises at their fair cash value, estimated at the price they would bring at a fair voluntary sale, should be set aside. It is certainly an unusual demand that the action of officers should be disregarded, although they may have acted in strict conformity to the law imposing the duty. The officers take an oath that they will faithfully discharge their duties, and, if they have due respect for their oaths, they are found to follow the requirements of the organic and statutory law of the State. There never can be exact equality and uniformity in taxation. The purpose of the constitutional provision in question was to require all property to be assessed at its fair cash value. There is no way to execute that provision of the Constitution, except officers be selected by the people for the purpose of assessing the property, that revenue may be raised to carry on the government. It does not seem to be logical, or sound in principle, to say that because one officer or a class of officers disregard the law, the action of those who strictly follow it *for that reason,* should be annulled. If that be a proper view, then the constitutional provision and the statutes become a dead letter, and the courts will be continually called upon to disregard the legal actions of legally constituted officers because other officers in the State have acted illegally. The court is called upon to constitute itself an instrument, not to uphold the Constitution, but to make complete the utter disregard of its provisions, by not sustaining a proper and legal action of the officers of the State in the performance of their duties. If the officers of the State are not properly assessing the real and personal property of the several counties of the State, and if the railroad commissioners of the State are not faithful in the discharge of their duties in assessing the railroad property of the State, then there must be a change of the personnel in the various offices of the State so as to bring about a condition, in so far as possible, that equality of assessment and taxation can be had. A speedier way would be to enforce the penal and criminal statutes of the State, if they are being violated. If they are, the prosecution of an offi-

cer would suffice to correct the evil complained of. It may be said that this will take time, and cause some of the taxpayers of the State to bear an unequal proportion of the burdens of taxation. It is far better that this should be done for a short time, rather than for the courts to adjudge illegal that which the organic law of the State declares is legal. We can not give our consent to declare void a proceeding because such proceeding *conforms to the law.*

Substantially the same question involved in this case was under consideration in the case of City of Lowell v. County Commissioners of Middlesex, 152 Mass., 375 (25 N. E. 470). The court said: 'It is a violation of the statutes knowingly to make a valuation of property for the purpose of taxation at less or more than its full and fair cash value. The just proportion intended by the existing statute is attained by assessing the property of different persons at a uniform rate, upon its fair cash valuation. Whatever may be the remedy, if there be any, when it is shown that the assessors have intentionally assessed the property of a part or all of the inhabitants at less than its fair cash value, we are of the opinion that in a petition for the abatement of taxes on the ground of the overvaluation of the property of the petitioner, and the disproportionate taxation arising from such overvaluation, the question is whether the property has been valued at more than its fair cash value, and not whether it has been valued relatively more or less than similar property of other persons.'

In New Jersey the question arose under laws somewhat similar to the laws of Kentucky; and the court, in Central R. R. Co. v. State Board of Assessors, 48 N. J. Law, 7; (57 Am. R. 1; and Atl. 792), said: 'The establishment of this system was much criticized by counsel; a prominent argument being that it necessarily introduced inequalities in the valuation of property for taxation, and that by force of its operation such valuation was not made, as the Constitution requires, by a uniform rule, but by a multiform rule. And, in support of this contention, the attention of the court was directed to the fact (which had been established, not only by the

testimony, but by the report of the State board of assessors itself) that, although it was the universal practice of the assessors of the different tax districts to rate property much below its real value, the State board had rated this corporate property at its true value. That this discrepancy, arising out of the practical operation of the methods of valuation, existed, was not disputed. But this result, it is manifest, was not the legal or proper result of the plan of assessment thus introduced by the Legislature. That plan provided but one measure of valuation (that is, the true value of the taxable property), and that measure was to be applied alike by the local assessors and the State board; so that, if both sets of officers had performed their duty, there would have obtained that unity of rule that the Constitution demands. The local officers disobeyed the injunction of the law; and the contention is that the State officers should have pursued the same forbidden course, and that their acts should now be declared to be abortive, because they refused to perpetrate such a malfeasance. Such an argument, in our estimation, has no force whatever, and, indeed, it seems a novel suggestion that a court should annul a proceeding because such proceeding conforms to the law."

In Illinois & St. Louis Railroad and Coal Company, et al. v. Stookey, 122 Ill., page 360, where a similar question was raised, the Supreme Court of Illinois in discussing it, spoke as follows:

"The bill shows that the railway in question lies within the townships of East St. Louis and of Centerville Station, in St. Clair county, and it is charged that the taxes for the year 1885 are based upon an assessment of the road by the State Board of Equalization at a fraction over its full cash value, whereas all other property within these townships not assessed by the State Board, was valued and assessed by the town assessors, for the same year, at about one-third its cash value, and that the same was taxed upon that basis. Such being the facts, it is contended that the tax, to the extent complained of, is violative of the provision of the

Constitution requiring uniformity in taxation, and in support of this view the cases of Bureau County v. Chicago, Burlington and Quincy Railroad Co., 44 Ill. 229, and Chicago and Northwestern Railway Co. v. Boone County, Id. 240, are cited.

While stopping to inquire whether the constitutional provision in question was properly applied in those cases, it is sufficient to say, that, in our opinion, it has no application to the circumstances of the present case. There is no claim, nor is there any ground for the claim, that the provisions of the statute governing assessments, whether made by town assessors or the State Board of Equalization, are in conflict with the Constitution. The statute requires all property to be valued and assessed, for purposes of taxation, at its 'fair cash value.' (Revenue Act, secs. 3, 4). This requirement, however, is nothing more than what the law would imply without it, for a simple, unqualified direction to value property, by its very terms imposes the duty of ascertaining and declaring its cash value. While the appellant, as a basis for taxation, scheduled the road at $44,880, which was intended to represent half its value, only, yet it is admitted in the bill that the total value of the railway was $100,000, being only $5,150 less than the valuation placed upon it by the board of equalization. When it is considered that the values rest so largely in mere opinion, about which men of equal intelligence and honesty often materially differ, this small difference between the road's conceded value and its estimated value by the State board, is not at all surprising, and is clearly not of sufficient consequence to justify the present proceeding.

The taxes complained of were extended upon this valuation in strict conformity with the statute, and this is expressly so declared in the bill. It follows, therefore, that if any wrong has been done, it was by the town assessors and not by the State board. The law required the State Board of Equalization to value the property at its fair cash value, and the taxes for that year to be extended against it upon that valuation. All this was done in substantial conformity with the requirements of the statute, yet the action of the board is assailed, and the

tax is in part sought to be set aside, simply because the town assessors probably failed to perform their duty in respect to the assessment of other property in the townships.

The appellant, in effect, says the board should have disregarded this law because the town assessors had done so in the assessment of the other property in the townships. This view of the matter we do not regard as sound. Valuations for purposes of taxation had necessarily to be left to the judgment and determination of some human tribunal. The legislature in its wisdom has confided this duty and trust, in the case of railroad property like the present, to the State Board of Equalization, and that its action in the premises was intended to be final, except where fraud or corruption has intervened, is evidenced by the fact that no appeal from its determination is provided. As was said in the late case of Connecting Railway Co. v. The People, ex rel., 119 Ill. 182: 'Under the statute, the valuation for taxation of the property here affected is committed to the State Board of Equalization. No appeal lies from its decision to the county court, when acting on applications for judgment for delinquent taxes, or at any other time. Its decision is judicial in its nature, and it can therefore be assailed for fraud or want of jurisdiction only.' To the same effect are the cases of Spencer, et al. v. The People, 68 Ill. 513, and Porter v. Rockford, Rock Island & St. Louis Railroad Co., 76 id. 561.

The bill in this case does not disclose any facts whatever to sustain the charge of fraud found in it. That the board was not bound by the valuation fixed by the company is no longer an open question, and need not be discussed. Spencer, et al. v. The People, *supra;* Republic Life Ins. Co. v. Pollak, et al., 75 Ill. 292; Humphreys, et al. v. Nelson, 115 id. 45.

In short, we do not think, under the facts disclosed by the bill, the court had any power or jurisdiction to review the action of the State Board of Equalization or to grant the relief prayed."

In Mooers vs. Smedley, 6 John Chanc. 28, where a similar question in principle was under consideration, Chancellor Kent expressed himself as follows:

"I cannot find by any statute or precedent or practice that it belongs to the jurisdiction of Chancery as a Court of Equity to review or control the determination of the supervisors in their examination and allowance of accounts as chargeable against their county or any of its towns, and in causing the money so allowed to be raised and levied. There was no allegation of fraud or corruption in the case. The most that could be said was that they made an erroneous determination. * * * It has always been a matter of legal, and never a matter of equitable, cognizance.

This is not the case of a private trust, but the official act of a political body; and in the whole history of the English Court of Chancery, there is no instance of the assertion of such a jurisdiction as is now contended for. The superintending control in these cases has always been exercised in Court of K. B. and nowhere else, and that court has proceeded by certiorari, mandamus, prohibition, information, etc."

In Throop on Public Officers, section 822, it is said:

"The court has no power to substitute its own judgment or discretion in place of that of the officer or body to whose judgment or discretion the matter has been referred by law."

In Mechem on Public Officers, section 990, it is said:

"The writ of injunction will not be granted to restrain a public officer from acting when he is proceeding by the authority and in pursuance of the law regulating his powers and duties, unless such law be unconstitutional or otherwise invalid. What a valid law authorizes the officer to do, the courts will not undertake to prevent, even though it be alleged that the officer is actuated by unworthy motives."

In High on Injunctions, section 1311, it is said:

"It is important to observe that courts of equity do not interfere by injunction for the purpose of controlling the action of public officers constituting inferior *quasi* judicial tribunals, such as boards of supervisors, commissioners of highways and the like, on matters properly pertaining to their jurisdiction, nor will they review and correct errors in the proceedings of such officers, the proper remedy, if any, being at law, by writ of *certiorari.*"

Nor do we understand that this court has ever held a contrary doctrine. The nearest approach to it is in Cummings vs. Merchants National Bank, 101 U. S., page 153. For the reasons heretofore stated in this brief, we do not consider the Cummings case binding upon this question.

The case of Raymond vs. Chicago Union Traction Co., 207 U. S., beginning on page 20, was relied upon as authority in the lower court. We do not conceive that this case is controlling, for the reason that the Raymond case was a suit to enjoin the county treasurer of Cook county, Ill., and other officers, from collecting certain taxes assessed against the traction company by the State Board of Equalization. It will be noticed that the ground of camplaint against the assessment is, to use the language of the statement of the case on page 27, that "there were hundreds of corporations subject to be assessed by such boards in the same manner that appellee was assessed under the writ of mandamus issued in respect to the taxes issued against it, and that not one of such corporations was, as a matter of fact, so assessed." In the opinion, it is said on pages 36 and 37:

"It is made entirely clear that the Board of Equalization did not equalize the assessments in the case of these corporations, the effect of which was that they were

levied upon a different principle or followed a different method than that adopted in the cases of other like corporations, whose property the board has assessed for the same year."

So it appears that the State Board of Assessment of Illinois, having power to assess the capital stock of certain corporations, assessed some corporations at their fair cash value, and assessed other corporations at less than their fair cash value, the same board making the discrimination.

In the instant cases, the Board of Valuation and Assessment of Kentucky, having the right to assess the franchises of corporations, assessed the franchises of all corporations at their fair cash value, and made no discriminations, as said in this brief before, the sole complaint being that other officers, having no connection with the State board, having assessed other property at less than its fair cash value. If the State Board of Valuation and Assessment of Kentucky had assessed the franchises of one corporation at its fair cash value, and assessed the franchises of another corporation at less than its fair cash value, then the Raymond case might apply, but as we view it, it is not authority upon the case here presented.

In the Raymond case, the case of Coulter vs. Louisville & Nashville Railway Co., 196 U. S. 599, is quoted as authority for the proposition that the franchises of corporations may be assessed at a different rate from tangible property. The Coulter case is one involving the identical law here attacked, and it was held in that case that:

"If it be a fact that the franchise of a Kentucky corporation is taxed at a different rate from the tangible property in the State, there can be no question that the State had the power to tax it at a different rate, so far

as the Constitution of the United States is concerned." The exact question here presented, being decided adversely to appellees in that case.

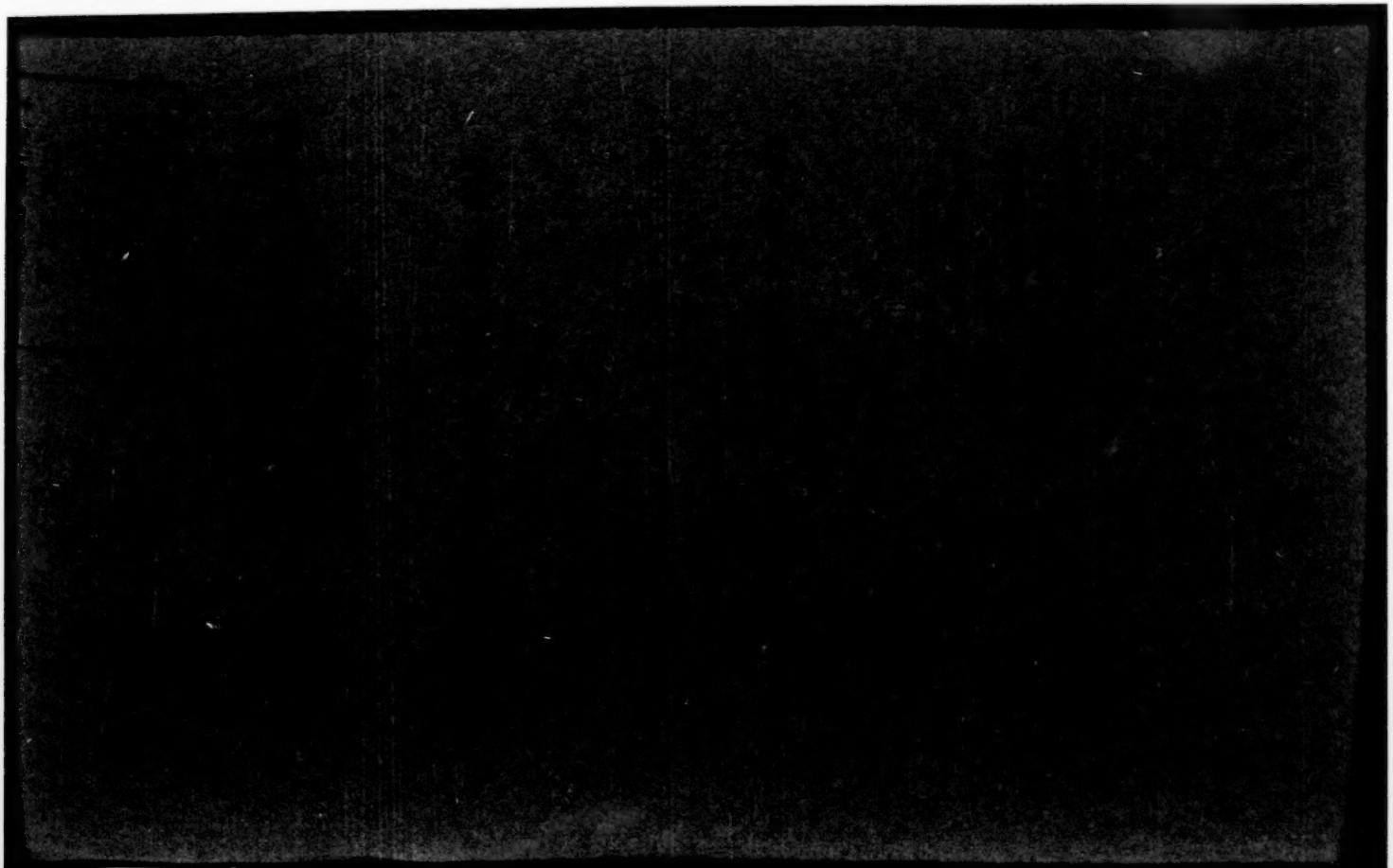
We submit these cases, and respectfully request that the judgment of the lower court be reversed, and the petition of appellees ordered dismissed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

Nos. 617, 618, 642, 643, 644, 645, 778, 779.

KENTUCKY RAILROAD FRANCHISE TAX CASES.

SUPPLEMENTAL BRIEF FOR STATE BOARD AND OFFICERS.

Counsel for the various railroads interested in this litigation have within the last two or three days filed supplemental briefs, and in view of the position taken in these briefs we deem it proper for us to set out our position more clearly touching the proper construction of sections 182 and 174 of the Constitution of Kentucky.

We are of the opinion that the proper construction of these sections is not material to the determination of the questions at issue in this litigation. We believe the position of the State officers is maintainable independent of these sections, but the correct construction of them, in view of the position assumed by counsel for railroads, is conclusive in support of our position.

In our main brief we have cited numerous decisions of the Kentucky Court of Appeals construing the statutes which

provide the proper method of assessing the franchises of railroads, and these decisions show that we are right in our contention that it is the duty of the State board to first ascertain the entire value of the railroads in Kentucky, and when this entire value is so obtained it includes every character of value which a railroad has, and when there is deducted from this total value the assessed value of the tangible property as made by the Railroad Commission the remainder is made up of every element of value which may be included in the valuation of railroad property. This must be literally true, and the statutes have called this remainder a franchise. We do not think it is material as to what name is given to this value, but it may be that the question is of more importance than we have attached to it, and for that reason we shall briefly state what, in our opinion, is the nature of the tax assessed against these railroads and the authority for making such an assessment.

2. Section 182 of the Constitution of Kentucky provides as follows:

> "Nothing in this constitution shall be construed to prevent the General Assembly from providing, by law, how railroads and railroad property shall be assessed and how taxes thereon shall be collected. And until otherwise provided the present law on said subject shall remain in force."

We contend that under the provisions of this section of the constitution the legislature had the power to classify railroads and railroad property for taxation and that such classification has been made by the provisions found in section 4077, *et seq.*, Kentucky Statutes. It is true that no statement is specifically made in that section which would justify a contention that a different rate may be applied to railroad property from that applied to other property in the State, but the section undoubtedly means that the legislature may adopt a plan or method for the assessment of railroad property which is different from the plan or method provided for the assess-

ment of other property within the State. Such different plan or method was adopted soon after the adoption of the present constitution. Such plan or method has been followed by the State of Kentucky in assessing railroad property for about twenty-five years. It would be difficult to imagine a way whereby property might be more clearly classified for taxation than by permitting the taxing authorities to follow a different plan or method in arriving at the value of property.

Two plans have been followed by the authorities in Kentucky as well as the taxing authorities in other States in ascertaining the entire value of railroad property. One of the plans is to capitalize the net income of the railroad. The other is to determine the total value of the outstanding stocks and bonds of the railroad company. By following either of these methods the value of a railroad company is ascertained as an income producer, and the value may be greater than the value of the physical property of the railroad. If the plan of capitalizing the net income of a railroad is followed the value of the road when ascertained may be much greater than the value of the physical properties of the railroad, including any securities which may be owned by the railroad.

The purpose of permitting a different plan in the assessment of railroad property was to allow the legislature to devise some plan whereby the entire property of the railroad would be assessed for taxation.

A railroad is not assessed under the laws of Kentucky in the same way that a farm, a horse, or a cow is assessed. It is not permitted under the laws of the State of Kentucky to capitalize the net income from a farm in order to ascertain the value of the farm, and it is not permissible to capitalize the net income from any corporation other than a railroad corporation to ascertain the value of such corporation. A farm worth only $5,000 may yield an annual income which if capitalized at 6 per cent would show the farm to be worth $20,000. Still the taxing authorities of Kentucky could not place a value upon such a farm of $20,000 because not per-

mitted to do so by the law, but in making the assessment of railroad property such a plan might be followed.

The plan followed is everything in the classification, and if a plan may be adopted which will reach a larger valuation of railroad property than would be reached if the plan followed in the assessment of other property in the State was also applied to railroad property, that is classification, and it has exactly the same effect as if railroad property was assessed the same as other property in the State, and a different rate applied.

If the value of a railroad company's property in the State of Kentucky will be doubled by capitalizing its net income over what the value would be fixed if the same rule were applied to railroads as is applied to other property, the result is the same as if the same method were applied to all property, including railroads and the rate were doubled as to railroad property. It is too clear for argument that a constitutional provision which permits a different method to be followed in assessing a certain class of property from that followed in assessing property generally, is classification.

In reply brief of Illinois Central R. R. Co., filed January 12, it is argued that no classification can be made of railroad property under the constitution of Kentucky except as to the method of assessment and collection. If we grant the argument to be true, it must follow that the constitution of Kentucky, as well as the statutes enacted pursuant thereto, does provide for a classification of railroad property, and having so provided it is admitted by counsel for the railroads in every brief filed by them that no law is violated in assessing the property of railroads at a higher percentage of its true value than other property in the State is generally assessed. Of course we deny that the property of railroads is assessed at a higher percentage of its value than other property in the State of Kentucky is generally assessed, but we say if it should be conceded that the contentions of the railroads to this effect is true, then if the constitution and laws of the

State provide for classification of railroad property, counsel for the railroads admit that they have no case.

In case of Traveler's Insurance Co. *vs.* Conn., 185 U. S., 364, the Supreme Court seems to have recognized that a classification of property for taxation may be made by providing for different methods of assessment. The court there said:

> "Railroads, banks, partnerships, manufacturing associations, telegraph companies and everyone of the numerous other agencies of business which the inventions of the age are constantly bringing into existence, require different machinery for the purposes of their taxation. The object should be to place the burden so that it will bear as nearly as possible equally upon all. For this purpose different systems adjusted with reference to the valuation of different kinds of property are adopted. The courts permit this."

In the Delaware R. R. Tax Case, 85 U. S., 206, the court clearly held that classification might be made either by applying a different rate of taxation or by providing for a different method of assessment. The court said:

> "The State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion."

We conclude that section 182 of the constitution of Kentucky most certainly provides for the classification of railroads and railroad property for the purposes of taxation, and since it is admitted by counsel for the railroads that if such a classification is permitted by the constitution and has been made by the legislature, there is nothing in the contention of railroads that they are entitled to relief in these actions on the supposed ground that railroad property is assessed at a higher percentage of its value in Kentucky than other property.

3. Section 174 of the constitution of Kentucky contains more than the provision that all property shall be taxed in proportion to its value, and that all corporate property shall pay the same rate of taxation paid by individual property. Probably the most important provision in this section of the constitution of Kentucky is contained in the last sentence, which is as follows:

> "Nothing in this constitution shall be construed to prevent the General Assembly from providing for taxation based on income, licenses or franchises."

The assessment made against railroads in Kentucky which led to these suits was an assessment known as a franchise assessment. The Court of Appeals of Kentucky has referred to the assessment as a franchise assessment or an assessment of the intangible property of railroads. Apparently the court has so designated assessments made by the State Board of Valuation and Assessment because the statutes of Kentucky refer to these assessments as franchise assessments, the value of corporate franchises, and other like terms. The Court of Appeals of Kentucky, however, has often taken the pains to explain the nature and character of this assessment. Quotations from the decisions will be found in our main brief.

We admit that loose language will be found in the various decisions of the Court of Appeals, showing that the court while writing did not deem it of great importance as to just the name that shall be given to the assessment made of railroad property by the State Board of Valuation and Assessment.

In the reply brief filed by the Louisville and Nashville Railroad counsel quote a number of decisions of the Court of Appeals, in which the assessment is referred to as the assessment of intangible property. We do not know whether counsel intend this reply brief as supplemental to what has been said in their original brief in support of their contention that tangible properties, wherever situated, should be

deducted before value shall be apportioned to Kentucky, or whether they are attempting to make the point that the assessment made by the State Board of Valuation and Assessment is a franchise assessment, and only franchise value can be fixed by the State Board of Valuation and Assessment.

This necessarily leads us to a consideration of what the assessment really is. The Court of Appeals has said that the tax based upon the assessment is a property tax, but as pointed out by counsel in reply brief last referred to, the Court of Appeals has also referred to the assessment as an assessment of intangible property. It may also be shown that the Court of Appeals has referred to the assessment as a franchise assessment.

Section 174 of the constitution permits the legislature to tax the franchise of any corporation. It is persuasive that this tax is a franchise tax when we come to examine the various companies and corporations embraced in the provisions of section 4077, Kentucky statutes.

Section 182 of the constitution of Kentucky only permits the classification of railroads for assessment for taxation. The section of the Kentucky statutes referred to does not only apply to railroad corporations, but to numerous other public-service corporations. As we have just said, this is persuasive that the legislature was imposing a franchise tax in truth and in fact upon the corporations mentioned in section 4077, including railroads. We are not going to be led into trouble by this admission, and this is not contradiction of any position which we have taken in the main briefs. We are attempting to state our position clearly in order that the court in the consideration of the questions in issue in this litigation may have the full benefit of our views touching this point.

If the railroad companies interested in this litigation desire to take the position that this is an assessment based wholly upon franchise of the railroads, we will not say that they are wholly without authority in support of the contention which they make.

If the taxation provided for and called a franchise assessment is in reality an assessment of the franchise of corporations in accordance with the power vested in the legislature by the provisions of section 174 of the constitution, it becomes necessary for us to look into the question to see whether the legislature has exceeded any authority conferred upon it.

The Court of Appeals of Kentucky in the case of Levi *vs.* Louisville, 97 Kentucky, 405, seems to have inclined to the opinion that the assessment made under the statutes now in controversy was the assessment of franchises under the provisions of section 174 of the constitution of Kentucky.

District Judge Barr, in the case of Western Union Telegraph Co. *vs.* Norman, 77 Fed., 28, seems to have had the same idea and expresses the idea rather forcibly in his opinion. His opinion was one of the first construing the provisions of the constitution and statutes of Kentucky relating to franchise assessment, and an appeal was taken by some of the litigants in his court to the Supreme Court, and it was in that litigation that the Supreme Court upheld the constitutionality of the statutes of Kentucky providing for a franchise assessment. The Western Union Telegraph Company did not appeal from the decision of Judge Barr, but the Adams Express Company, which was also a party to the litigation, did appeal, and the opinion of the Supreme Court upholding the constitutionality of these statutes is found in 166 U. S., 181. The Supreme Court seems to have been of the opinion that the assessment was an assessment of the franchises of railroads.

Probably the clearest discussion of the nature of this tax imposed by the State Board of Valuation and Assessment upon railroads will be found in a decision of the Court of Appeals of Kentucky in the case of Cumberland Telephone & Telegraph Companies *vs.* Hopkins, 121 Ky., 856. In this case the Court of Appeals discussed the question at some length and in the course of the opinion it was said:

> "A corporation franchise may be one thing or another. The word is not always used with reference to the same meaning. It is sometimes regarded as the mere right to be a corporation. Again, it is treated as the right to do the particular and peculiar business for which the corporation was created. It also was spoken of as the right to do its business in a certain locality, as, for example, where the constitution requires certain franchises to be sold by cities and towns."

The court said, however, that for the purposes of taxation the franchise might be all the things enumerated in the opinion and even more than all the things mentioned. That opinion also states:

> "Railroads are required to pay taxes upon their tangible property. The mode of taxing is set out by statute. It is to be valued as an entire piece of property 'for the purpose of being operated as a carrier of freight and passengers,' that is, the road bed, including right of way and tracks, depots, sidings, and its cars, equippage and tools are to be taxed in the aggregate as a railroad. The franchise tax is 'in addition to the other taxes imposed on it by law,' and is meant to cover all the intangible property of the concern as represented by the carrying value of its capital employed for the specific business of a carrier of freight and passengers."

Let us suppose, for the purpose of considering this point, that it is true that the tax imposed by the State Board of Valuation and Assessment upon railroads is purely a franchise tax. Let us also suppose that the Court of Appeals of Kentucky, as well as the Federal courts, have styled this tax a property for the reason, hereafter explained, that the tax is arrived at upon the basis of the entire value of the property, and then let us see where we will be led.

In the case of Home Insurance Co. of New York *vs.* People of the State of New York, 134 U. S., 594, this court

took occasion to determine just what a legislature might do in requiring a corporation to pay a franchise tax. The court there held that the right or privilege to be a corporation, or to do business as such, was a right of value to the corporators. The court then continued as follows:

> "The granting of such right or privilege rests entirely in the discretion of the State, and, of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy. It may require as a condition of the grant of the franchise and also of its continued exercise, that the corporation pay a specific sum to the state each year, or month, or a specific portion of its gross receipts, or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe. The validity of the tax can in no way be dependent upon the mode which the state may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows."

This decision is definite and concise. The State of Kentucky had the right to require every railroad doing business in Kentucky to pay a franchise, and it had the right to require a payment each year for the continued exercise of the right to be a railroad and engage in the railroad business in Kentucky. Not only that, but the legislature had the full power to prescribe the method whereby the amount which every railroad company should pay each year should be ascertained. The validity of the franchise tax does not depend upon the mode which the State of Kentucky has seen fit to adopt in fixing the amount for any year which it will exact for the franchise of these railroads. No constitutional objection was in the way of the legislature of Kentucky when it prescribed a mode of measurement to determine the amount that every railroad corporation must pay as a franchise to the

State each year. Then it is proper to determine what method has been adopted by the legislature of Kentucky to ascertain the amount which every railroad must pay as a franchise each year for the right to be a railroad and exercise the railroad business in Kentucky. Regardless of whether it is called tangible property, intangible property, or whether it is called property at all, the plan is simple and within constitutional limitations. The legislature had said to every railroad, your physical property shall be assessed by the Railroad Commission, but this franchise shall be determined by the State Board of Valuation and Assessment. The method to determine the amount which shall be paid as a franchise tax each year is that the State Board of Valuation and Assessment shall determine the entire value of the railroad property in Kentucky, and from that value shall be deducted the assessed value of the tangible property made by the Railroad Commission. The tax rate for the State and for the county, cities and taxing districts is then applied to that sum which is left as the corporate value of the franchise, and the sum which is realized by the application of the tax rates to the value of the corporate franchise is the amount which the railroad must pay each year.

To properly understand the matter it is necessary to consider section 182 of the constitution and section 174 together. Section 182 permits the legislature to adopt a method in the assesment of railroad property, but the value placed upon railroad property by the method provided for in section 182 cannot be greater than the actual value of the railroad property in the State of Kentucky as an income producer. The tangible property is assessed by the Railroad Commission and the assessed value of the tangible property is deducted from the total value and the amount of franchise which must be paid under the provisions of section 174 is determined by the method above indicated. It was not necessary for the legislature to determine the question in this way, as it could have provided for the assessment of railroad property in the same

way that other property in the State is assessed, and it could then have provided for the payment of a franchise tax in some other way, but it was left to the legislature to determine the mode of ascertaining the amount which a railroad company should pay for its right to exercise its franchise in the State. We can thus see why it is that the courts have called the tax collected upon the assessment made by the State board a property tax. In a sense it is a property tax, because the amount thereof is determined by the value of the property owned by the corporation in the State.

Looking at the matter in this light we can also see why it is that the courts have said that the assessment is a franchise assessment and that the tax is a franchise tax. We can also see why the courts have said that it is an assessment of intangible values. In every instance it depended upon the angle from which the question was viewed by the courts, and in a broad sense the expressions found in the opinions of the court are all correct.

The scheme is a good one, in that it carefully prevents the collection of a tax either in the nature of an ad valorem or franchise which is greater than the tax which would be collected upon the full value of the property of railroads, regardless of what the tax might be called.

In the cases under consideration the amount which the State of Kentucky requires the railroads to pay is no greater because of the franchise which is laid upon the property than would have been collected by the State if the property had been assessed at its full value and no franchise had been collected. We mean full value, of course, as defined by the courts; that is, a value which includes every species of property owned by the railroad company, including tangible and intangible property, as well as the value added to the property by reason of the franchise which the company exercises.

4. If the assessment is based upon the value of the franchise then under the provisions of section 174 of the constitution of Kentucky the legislature had the right to tax fran-

chises and having exercised that right there can be no question of equalization in this case. Franchises are certainly classified for the purpose of taxation, and in view of the fact that counsel for the railroads all admit that if there has been a classification the railroads are entitled to no relief for the supposed reason that their property is assessed at a higher percentage of its value than other classes of property in the State.

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SUPREME COURT OF THE UNITED STATES

ROBERT L. GREENE, Auditor; SHERMAN GOODPASTER, Treasurer, and JAMES P. LEWIS, Secretary of State, Constituting the Board of Valuation and Assessment for the State of Kentucky, Et Al., - - Appellants,

vs. No. 617.

LOUISVILLE & INTERURBAN RAILROAD COMPANY, - - - - - - - - Appellee.

and

ROBERT L. GREENE, Auditor; SHERMAN GOODPASTER, Treasurer, and JAMES P. LEWIS, Secretary of State, Constituting the Board of Valuation and Assessment for the State of Kentucky, Et Al., - - Appellants,

vs. No. 618.

LOUISVILLE RAILWAY COMPANY, - - Appellee.

Supplemental Brief for Appellants.

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IN THE

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LOUISVILLE RAILWAY COMPANY, - - - - - *Appellee.*

SUPPLEMENTAL BRIEF FOR APPELLANTS.

Because we believe there are certain erroneous legal conclusions in appellees' brief, the appellants submit this supplemental brief.

It is insisted on pages 17 and 18 of appellees' brief that Section 162 of Ky. Stats., copied on page 17, and set out

in full on page 50 of appellants' brief, does not apply to the cases at bar.

This statute was first construed by the Kentucky Court of Appeals in Bank of Commerce v. Stone, Auditor, 108 Ky., page 427. It was there held that a suit against the Auditor was the proper remedy to recover excessive payment of taxes paid into the State Treasury by the bank, where the payment was made on a levy of 75 cents on the hundred dollars, when it should have been 42½ cents.

The same rule was applied in the construction of this statute in German Security Bank v. Coulter, Auditor, 112 Ky., beginning on page 577.

In the latter case, the bank further claimed that some of its assets were invested in certain stocks which were not taxable, but they had paid taxes upon those stocks, and sought to recover this payment by suit against the Auditor, on the claim that the assessment was excessive. The court held this could not be done, as that would make the Auditor an assessing officer, and this the statute did not contemplate.

In Couty v. Bosworth, Auditor, 160 Ky., beginning on page 312, the Court of Appeals again held that under this section of the statute, that the Auditor is not an assessing officer, and he can not be compelled to refund money paid into the treasury, where it is claimed that payment was upon a higher valuation of the property than the law allowed, or the property was not subject to taxation.

In the Couty case it further appears that the money was voluntarily paid by Couty to the sheriff, who is a tax collecting officer, and the court held that the statute did not apply to voluntary payment of taxes, or to a payment other than directly into the State Treasury.

In Bosworth, Auditor, v. Metropolitan Life Ins. Co., 162 Ky., beginning on page 344, it was again held that the Auditor was not an assessing officer, and he was not authorized to correct assessments made of the property of taxpayers, and to refund the amount he thought was over-paid, and this is the doctrine laid down in Louisville Gas & Electric Co. v. Bosworth, 169 Ky., beginning on page 824.

In the latter case, it appears that the Gas Company had paid directly into the Treasury a sum as an organization tax, greater than it owed, that is, it owed an organization tax upon a capital of $11,000,000, and it was required to pay upon a capital of $13,500,000. The Court of Appeals held that the tax paid in excess of a tax on $11,000,000 was wrongful, and further held that the payment was not voluntary, because the company could not begin business until the full amount of tax demanded was paid; therefore the payment was coereive, and directed the Auditor to refund it, under Section 162 of the statute.

From those cases, we conclude that where money is paid into the State Treasury for taxes, in excess of the amount due, the Auditor can be compelled to refund, under Section 162 of the statutes, except in the following cases:

1st. Where money was paid because of the over-valuation of the property assessed. In such case, it would be necessary for the Auditor to act as an assessing officer, and assess the property. This he could not do.

2d. Where a voluntary payment of taxes is made, that is, where taxes which could be recovered only by suit, are paid into the State Treasury without litigation. In this case, the person so paying, waives his day in court, and can not recover.

In all the cases involved in this litigation, the claim is not made that the property is over-assessed. The claim is made that the property of plaintiffs (appellees) is assessed at 100% of its value, and other property is assessed at 60% of its value. Therefore it is charged in the petitions that the payment upon a valuation exceeding 60% is void. It is exactly the same as the Bank of Commerce case, and the German Security Bank case, where a recovery was permitted of the Auditor, where collection was made upon a taxation of 75 cents on the hundred dollars, where the taxation in one case should have been 42½ cents and in the other case 52½ cents on the hundred dollars, and exactly as in the Gas & Electric Company case, where the collection was made upon a capitalization of $13,500,000 when the payment should have been made on the capitalization of $11,000,000. If the contention of plaintiffs (appellees) is true, none of the excessive payments made were voluntary payments, because by Section 4091, Ky. Stats. (page 25, appellants' original brief), a failure to pay this tax within thirty

days, subjects the delinquent to a penalty of 10% on the amount of the tax, and a fine of $50.00 for each day the tax is unpaid.

It will not be seriously contended that a payment to avoid such penalties, would be a voluntary payment.

As we view it, those cases come directly within the principle of Singer Sewing Machine Co. v. Benedict, 229 U. S., page 481.

PROCEEDING AGAINST THE STATE BOARD OF EQUALIZATION—PROPER REMEDY.

It is argued in appellees' brief, pages 18-19-20-21, that a proceeding against the State Board of Equalization by appellees could not be maintained, because appellees have suffered no special injury by reason of any act of the State Board of Equalization.

We confess our inability to appreciate this argument. The State Board of Equalization has absolute control over the action of the county assessors, and it is the duty of that Board to see that all property coming within its jurisdiction is assessed at its fair cash value.

Now, the sole complaint of appellee is that the local assessors failed to assess property under their jurisdiction exceeding 60% of its value, but that the State Board of Valuation assessed its property at 100% of its value, and by reason of the failure of the local assessors to assess property at its fair value, and the act of the State Board in assessing appellees' property at its fair value, special damage was done it.

If the local assessors did their duty, no special or other damage would be sustained by appellee, and if the State Board of Equalization corrected, as it had the power to do, any under-assessment made by the local assessors, then appellee would have no cause to complain, because it would sustain no special damage, and it can remove its cause of special damage, if any it has, by compelling the State Board of Equalization to act, as well as it can by compelling the State Board of Valuation to act. If the cause of special damage can be removed by either course, that course which is most equitable should be pursued.

Respectfully submitted,

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Supreme Court of the United States

No. 617

ROBERT L. GREENE, Auditor; SHERMAN GOODPASTER, Treasurer, and JAMES P. LEWIS, Secretary of State, constituting the Board of Valuation and Assessment for the State of Kentucky, et al., - - - - - - - - - *Appellants,*

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vs.

LOUISVILLE RAILWAY COMPANY, - - *Appellee.*

BRIEF FOR APPELLEES

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JANUARY 4, 1917

The Standard Printing Co. (Incorporated) Louisville, Ky.

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BRIEF FOR APPELLEES.

STATEMENT.

The above cases with a number of others have been ordered heard together.

The appellee, the Louisville & Interurban Railroad Company, is a Kentucky corporation owning lines of

interurban railroad running out of Louisville, Jefferson County, into various sections of that county and adjacent counties. Its lines do not go out of Kentucky.

The Louisville Railway Company is a Kentucky corporation owning and operating the electric street railway lines in the city of Louisville, and extending for short distances into Jefferson County.

The legal questions involved in both cases are exactly the same, and similar legal questions, with others, are involved in the remaining cases ordered to be heard with these two.

The difference between the two cases to which this brief refers and the other cases is this: Both of these cases went off on a motion to dismiss the bill for the want of equity. There are, therefore, no disputed facts in these two cases. Again, while the other cases involve a number of questions regarding the proper method to be pursued by the State Board of Valuation and Assessment in fixing the amount of the property of the litigants subject to assessment in Kentucky, part being in and part out of the State, there is no such question in these cases because all of the property of both appellees is in Kentucky.

The laws relating to the assessment of property by the State Board of Valuation and Assessment are fully set out in the brief of appellants in these cases and need not, therefore, be repeated in this brief. It is sufficient

to say that under Section 4077, Kentucky Statutes (Appellants' Brief, p. 20), the appellees are subject to tax upon what is called in that section the "franchise." Subsequent sections relating to the same matter are likewise given in the brief of the appellants.

By virtue of the provisions of these various sections it was the duty of the appellees to make a certain report to the Auditor of Kentucky, giving to this official information in regard to the business of the company. Section 4079 (Appellants' Brief, p. 22), after providing the character of this report, provides as follows:

> "Provided that said Board from said statement and from such other evidence as it may have, if such corporation, company or association be organized under the laws of this State, shall fix the value of the capital stock of the corporation, company or association as provided in the next succeeding section, and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this State or in the counties where situated. The remainder thus found shall be the value of its corporate franchise subject to taxation as aforesaid."

We quote a part of the next section (Appellants' Brief, p. 23):

> "If the corporation, company or association be organized under the laws of any other State or government except as provided in the next section, the Board shall fix the capital stock in this State by capitalizing the net income derived in this State, or it shall fix the capital stock as hereinabove provided."

It will not be challenged that the method prescribed in the second quotation given above is the method to be applied to such corporations as the appellees. And this was the method applied.

The value of the tangible property of the first appellee, the Louisville & Interurban Railroad Company, is fixed by the Railroad Commission. The value of the tangible property of the Louisville Railway Company is fixed by the local assessor of Jefferson County. The State Board of Valuation and Assessment is composed of the Auditor, Treasurer and Secretary of State. The Auditor lays before this Board the amount of the assessment of the tangible property and the reports made by the appellees to him, and from this report the Board fixes the value of the capital stock of the corporation and deducts from that amount the tangible property assessment, and certifies the difference as subject to taxation for the franchise. This so-called "capital stock," under the decisions of the Court of Appeals of Kentucky as followed by the decisions of this Court (Henderson Bridge Co. vs. Commonwealth, 99 Ky. 623; Henderson Bridge Co. vs. Commonwealth, 166 U. S. 151), is the totality of value of all property, tangible and intangible, of the corporation.

The tax upon the franchise is a property tax. This has been determined by the Court of Appeals of Kentucky and by this Court, in the cases above cited.

It is alleged in each of these bills of complaint that the State Board of Valuation and Assessment capitalized the net earnings of each of these corporations at 6 per cent., and having in that way ascertained what, in their judgment, was the value of the capital stock of the respective corporations, took not 100 per cent. but 75 per cent. of the amount thus fixed; that from this 75 per cent. the Board deducted the assessed value of the tangible property and called the difference the value of the franchise; and upon this value the tax was imposed.

The bill alleged as follows (R. p. 4):

> "6. The plaintiff states that for many years past, including the taxing year 1914-1915, the taxes for which are here in controversy, the local assessors of the State of Kentucky have assessed the property of individuals and of corporations within their sphere of duty at less than 52 per cent. of the fair cash value of said property, estimated at the price which it would bring at a fair and voluntary sale, and that the assessing officers have for many years last past habitually, intentionally, systematically and generally assessed the property of individuals and of corporations within their sphere of duty that consists of 80 per cent. of the total taxable property at not exceeding 52 per cent. of the fair cash value of said property, estimated at the price which it would bring at a fair and voluntary sale. The fact of such systematic assessment upon this basis for every year for many years last past has been a matter of public notoriety in the State of Kentucky and has been stated and dwelt upon in the reports of the State Board of

Equalization of the State of Kentucky and in the reports of a tax commission which was created and organized under House Resolution No. 24, session of 1912 of the Legislature of the State of Kentucky, and which, under said resolution, made its report as required thereby. And so it is that 80 per cent. of the property in the State of Kentucky is made to pay State and county taxes, including county and district school taxes, upon an average value of less than 52 per cent., whereas the said Bosworth, Rhea and Crecelius, acting as the State Board of Valuation and Assessment, after ascertaining what, in their judgment, was the fair cash value of plaintiff's capital stock, reduced said value only to the extent of taking 75 per cent. thereof, instead of taking 52 per cent., the average rate applied by assessing officers to the vast body of property in this State.

"7. The plaintiff states that in other cases pending in this court, this court has adjudged that the taxing officers of the State of Kentucky have habitually, intentionally, systematically and generally assessed the property of individuals and of private corporations in the State of Kentucky at 60 per cent., or less, of the fair cash value of said property, estimated at the price which it would bring at a fair and voluntary sale. The plaintiff says that this is true, and that, as stated above, the said officers have, for many years last past, habitually, intentionally, systematically and generally assessed the property of individuals and of private corporations which as above comprises 80 per cent. of the taxable property at not exceeding 52 per cent. of the fair cash value of said property, estimated at the price which it would bring at a fair and voluntary sale thereof; but the said Bosworth, Rhea and Crecelius have denied plaintiff the benefit of equalization, to which it was entitled as aforesaid—to the great and irreparable damage of the plaintiff; that thereby the plaintiff has been

> by the said defendants deprived of its property without due process of law, and denied the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States, and in violation of the Constitution of the State of Kentucky and in disregard of the laws of said State; and plaintiff hereby sets up and relies upon the protection of said Federal and State Constitutions and laws."

The bills then alleged a willingness to pay a franchise tax upon 60 per cent. of the valuation after deducting the assessed value of the tangible property, and insisted that the difference between this 60 per cent. and 75 per cent. after such deduction could not be exacted of the complainants without a violation of the State and Federal Constitutions.

The appellees further alleged the payment of State taxes on the basis of the 60 per cent., and that the defendants were about to proceed to endeavor to collect the larger amount, to exact penalties and to certify to the taxing districts the alleged assessment; that there was danger of the complainants' being subjected to a multiplicity of suits, and that these assessments, if not vacated, would be a cloud upon the title to the complainants' property, for the reason that the taxes thereunder were made by statute a lien upon such property.

As stated above, the appellants filed no answer, but contented themselves with moving to dismiss the bills, which is equivalent to the interposition of a general

demurrer. The motion was overruled, and a final decree of injunction was entered in accordance with the prayers of the bills.

The amount involved in these two cases, while far beyond the requisite jurisdictional sum, is yet small compared with the amounts involved in the other cases. The particular questions involved in these cases, as stated above, are involved in the other cases; and in the other cases the learned judge below delivered elaborate opinions—one reported under the style of Louisville & Nashville Railroad Company vs. Bosworth, 209 F. R. 380; the other, Louisville & Nashville Railroad Company vs. Bosworth, 230 F. R. 191.

A large part of each of these opinions deals with questions not involved in the instant cases: (1) as to whether allegations of discrimination made in these other cases had been proved; (2) as to methods of assessment and apportionment in the case of corporations whose lines were only partly within the State of Kentucky. As stated above, there is no question of fact in these two cases, the demurrers admitting the truth of the allegations of the bills; and no question of method of assessment or apportionment, these questions largely arising by reason of the fact that in the other cases the lines of railroad involved extended beyond the State of Kentucky, whereas in the instant cases all the property of the complainants is within the boundaries of the State.

The appellants in their brief have set forth three grounds upon which it is argued that the judgments in these cases should be reversed.

Both in reasoning and in authority the opinions of Judge Cochran in Louisville & Nashville Railroad Company vs. Bosworth, 209 F. R. 380, and Louisville & Nashville Railroad Company vs. Bosworth, 230 F. R. 191, and the briefs filed in the cases of the Louisville & Nashville Railroad Company and the Illinois Central Railroad Company heard with the cases under discussion, are so full that we do not care to burden the court with what must necessarily be mere repetition.

ARGUMENT.

1. *It is insisted that this is a suit against the State and within the inhibition of the Eleventh Amendment.*

The opinion of Judge Cochran in Louisville & Nashville Railroad Company v. Bosworth, 209 F. R. 380, fully examines this question as applicable to such suits as are now under consideration. See, especially, page 385 and following of that opinion.

Again, the matter is fully discussed, with citation of authority, including such cases as have been decided since Judge Cochran delivered his opinion, in the brief in the Louisville & Nashville cases. We refer to page 15 and following of that brief.

The matter is also discussed, with full citation of authority, in the brief filed on behalf of the Illinois Central Railroad Company, at page 38 and following.

A great many cases have been decided by this court involving the application of the Eleventh Amendment. A line separates these cases, those upon the one side holding that in the case under consideration the suit was really against the State and hence beyond the jurisdiction of the court, and those upon the other holding that the suit was rightly brought against the individual defendants, although officers of the State, and was not within the inhibition of the Eleventh Amendment. We submit that the cases at bar clearly belong to the latter class and that they have been definitely and finally decided to belong to this latter class by the case of Home Telephone Company vs. City of Los Angeles, 227 U. S. 278, following and expressly approving Raymond vs. Chicago Traction Company, 207 U. S. 20.

2. *It is insisted that the court cannot enjoin the assessment made by the State Board of Valuation and Assessment, even though it is at a higher ratio of the value of the property of the complainants, in proportion to its fair cash value, than is applied by other assessing bodies of the State to property within their assessing jurisdiction.*

It is to be noted that as stated above there are no questions of disputed fact in these cases, the cases going

off on demurrer. That demurrer admits that under the conditions as set out in the bills 80 per cent. of the property in the State is by the assessing officers habitually, intentionally, systematically and generally assessed at not exceeding 52 per cent. of the fair cash value of the property estimated at the price it would bring at a fair and voluntary sale.

Take the case of the Louisville Railway Company. Here it is alleged that it appeared from the report of that company to the Auditor that the plaintiff had paid out in interest $594,166.66, and in dividends $637,316.67; that these amounts added together make $1,231,483.33, but that the report showed that after deducting the above amount and expenses and taxes from the gross receipts there was a deficit of $157,547.04; that the Board deducted this amount from the interest and dividends paid, leaving a balance of $1,073,936.29; that the Board then capitalized this amount at 6 per cent., took 75 per cent. of the result, and then fixed the value of the capital stock at $13,400,000.00—substantially the amount arrived at arithmetically by the above method.

In the same bill it is stated that the said Bosworth, Rhea, and Crecelius, acting as the State Board of Valuation and Assessment, after ascertaining what, in their judgment, was the fair cash value of plaintiff's capital stock, reduced said value only to the extent of taking

75 per cent. thereof, instead of taking 52 per cent., the average rate applied by assessing officers to the vast body of property in this State.

The bill further alleged: "The plaintiff states that it is ready, and has always been ready, willing and able to pay all taxes due to the Commonwealth of Kentucky, and all county and school taxes; that it paid promptly all such taxes for all the years prior to the one in controversy; that it has paid the State and county taxes upon its tangible property for the year in controversy, and has also paid the State taxes upon its franchise as arrived at by taking the value of its capital stock as found by the capitalization method hereinbefore referred to and taking 60 per cent. of such valuation; that is to say, the $13,400,000.00, being 75 per cent. of the valuation of its capital stock arrived at by capitalizing at 6 per cent. in the manner stated above, would realize the sum of $17,866,666.66; 60 per cent. of this sum is $10,720,000.00; deducting from this sum the valuation of plaintiff's tangible property—$3,726,715.00—leaves the sum of $6,993,285.00; and the plaintiff has paid to the said Rhea, Treasurer of the State of Kentucky, through the said Bosworth, Auditor of the State of Kentucky, 55 cents on the $100 of this sum, which is $38,463.06, but the said sum has been received by the said persons only in part payment of the amount demanded."

No allegation of payment was made in reference to the county taxes or the taxes due municipalities or districts because it was impossible to determine what these were until the certification had been made by the State Board.

It is claimed in the brief for the appellants that, taking our pleading most strongly against the pleader, notwithstanding the above quoted allegations we must be presumed to have alleged that the Board fixed the value of the capital stock at $13,400,000.00. We should be perfectly willing to have the pleading construed in that way as it would only make the case stronger, 60 per cent. of $13,400,000.00 being less than 60 per cent. of $17,866,666.66. But in fairness to the State, the complainants are bound to say that after finding the fair cash value of the property by the capitalization method, as prescribed by the statute, the defendants did not attempt to make this a final assessment, but took only 75 per cent. of this. Therefore, the difference in contest here is simply the taxes on an amount between 75 per cent. of $17,866,666 and 60 per cent. of that amount, instead of the difference between $13,400,000 and 60 per cent. of that amount, after deducting in each case the value of the tangible property.

The same statements are true as to the bill of the Louisville & Interurban Railroad Company, it being there alleged that the Board, having found the value

of the capital stock by capitalizing at 6 per cent., had taken 75 per cent. of this capitalization, instead of 60 per cent., as the bill claims should be taken.

Coming now to the question of law upon these undisputed facts, we deem it entirely sufficient to refer to the discussion of this question by Judge Cochran in the case above cited—the Louisville & Nashville Railroad Company vs. Bosworth, 230 F. R. 191 (page 205 and following).

The question is also fully discussed in the brief filed on behalf of the Louisville & Nashville Railroad Company, at page 146 and following, and in the brief filed on behalf of the Illinois Central Railroad Company, at page 104 and following.

We do not think it at all necessary for us to review the many authorities in the State courts and in the Federal courts dealing with this question, for at last it is, we submit, controlled by two cases decided here, namely, Cummings vs. National Bank, 101 U. S. 153, and Raymond vs. Chicago Traction Company, 207 U. S. 20.

The sections of the Constitution of Kentucky which apply to the question in controversy are set out in full in the brief of the appellants at page 6. Without quoting the whole of each of these sections we will recite so much of them as seems to be necessary for the argument.

Thus by Section 171 it is provided:

> "Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax."

By Section 172 it is provided:

> "All property not exempted from taxation by this Constitution shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale."

By Section 174 it is provided:

> "All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this Constitution; and all corporate property shall pay the same rate of taxation paid by individual property."

It is obvious that when the amount of the tax to be paid by an individual or a corporation is to be determined there are two factors: (1) the assessed value of the property and (2) the rate of taxation. The Kentucky Constitution requires that both of these shall be constant factors; that is, that the same factors shall apply to all kinds of property, without regard to individual or corporate ownership.

The purpose of these provisions is plain; they are designed to secure uniformity and equality. Classification of property for taxation is forbidden by these

sections. Any diversity of rate is also prohibited by them.

The Court of Appeals of Kentucky, in Louisville Railway Company vs. Commonwealth, 105 Ky. 710, did not hold either (a) that there could be a classification of property for taxation or (b) that there could be a diversity of rate. We submit that the opinion in that case admits that our Constitution requires a uniformity of assessment and a uniformity of rate. All that it decides is that the courts will not enjoin an assessment which complies with the constitutional mandate, namely, the fixing of the amount at its fair cash value, even though as to the large proportion of property whose value is fixed by other assessing bodies these officials make no attempt to obey the constitutional mandate.

We submit that it is impossible to say that there is an equal protection of the law where such a system is allowed to obtain, and that, besides other authorities, the two cases which we have above cited from this court hold that for this admitted wrong the Fourteenth Amendment provides a remedy.

3. *It is insisted by the appellants that there was another efficient remedy, and that therefore a court of equity should not interfere.*

Under this head two remedies are proposed.

(a) It is said that if the complainants had paid these taxes they could have recovered them under Section 162 of the Kentucky Statutes. That section reads as follows:

> *"Taxes Wrongfully Collected Refunded.*— When it shall appear to the Auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the treasury for such money so improperly paid, in behalf of the person who paid the same. Nothing herein contained shall authorize the issuing of any such warrant in favor of any person who may have made payment of the revenue tax due on any tract of land, unless it is manifest that the whole of the tax due the Commonwealth on such land has been paid, independent of the mistaken payment, and ought to be reimbursed."

In view of the later decisions of the Court of Appeals of Kentucky, however, this position cannot be maintained.

In Louisville Gas & Electric Company vs. Bosworth, 169 Ky. 824, the court, at page 829 and following, reviewed this section (162) of the Kentucky Statutes and made the following observations in regard to it:

> "These statutes became a part of the law of this State in the year 1854. They evidence a continued legislative policy from that time until now. Construing these statutes, it has been held that the Auditor is not an assessing officer, and

> one claiming that his property has been erroneously assessed for taxation and valued too high, or some property included in the assessment which was exempt from taxation, can not require the Auditor to make an inquiry into the assessment of anyone's property to determine whether or not an erroneous assessment has been made and thereby money has been collected for taxes which were not due, and to correct such an assessment and to draw his warrant on the treasury for an amount found to have been paid from an erroneous assessment, and a mandamus will not lie to compel him to do so."

This doctrine is also laid down in the case of Bosworth, Auditor, vs. Metropolitan Life Insurance Company, 162 Ky. 344, where the Kentucky authorities up to that time are reviewed.

(b) The other remedy proposed to the taxpayer by the appellants is a mandamus against the State Board of Equalization or the County Board of Supervisors or the County Assessors requiring one or all of them to raise the assessments made or equalized by one or the other of them so as to make them equal to the fair cash value of the property whose assessment or equalization comes within the scope of their powers.

The trouble about this is that such a proceeding by the complainants would have had no result. It would not have brought down the complainants' assessments to the level of the other assessments, but

would simply have brought up the other assessments to the level of the complainants' assessments. In other words, this would have afforded no sort of relief against the comparative over-assessment of the property of the complainants in these cases. Such a proceeding might possibly, if the law allowed it to be taken, be for the general good of the State, but it is a matter in which the complainants here are interested only as every other taxpayer in the State is interested. The result of the proceeding would not in any way affect the rate of taxation, and the complainants would have to pay just as great an amount of taxes if they succeeded in such a suit as if they failed in the suit.

Section 477 of the Civil Code of Practice of Kentucky defines mandamus as follows:

> "The writ of mandamus, as treated of in this chapter, is an order of a court of competent and original jurisdiction, commanding an executive or ministerial officer to perform an act, or omit to do an act, the performance or omission of which is enjoined by law; and is granted on the motion of the party aggrieved, or of the Commonwealth when the public interest is affected."

It would seem to be quite obvious that a private citizen cannot invoke the writ of mandamus unless he has some interest in requiring a public officer to

perform a duty, which interest is special or in some way different from that which belongs to the public at large.

There are many instances in the law in which the redress of wrongs is left alone to the State. Thus, in the case of a nuisance, if public, only the public can complain. An individual must show some interest peculiar to himself in order to be allowed to call for the abatement of the nuisance.

Again, in the case of the misuse or the failure to use corporate franchises, resulting in a right to forfeit the franchise, it belongs to the public to interfere unless there is some special private right infringed.

Furthermore, we have the distinction between corporations and, indeed, officers *de jure* and *de facto*. It is for the State to determine whether it will challenge the right of an officer to hold his place or of the corporation to continue to exist (such officer or corporation being *de facto*), unless there is some special private interest which calls for a challenge of the right of the officer to serve or of the corporation to exist, and such circumstances as will allow a direct and not an indirect attack upon the title to the office or the existence of the corporation. Indeed, it is to be observed that the remedy mainly dwelt upon by the Court of Appeals of Kentucky in the case of Louisville Railway Company vs. Commonwealth, 105

Ky. 710, is an appeal to the electorate to choose officers who will follow the law in the performance of their duties as assessing officers.

We apprehend that the appellants allowed the instant cases to go off on demurrer because it was desired to settle questions of law upon an admitted state of facts. We have made our discussion brief because it has seemed to us that the questions raised have been concluded by the binding authority of the decisions of this court.

We submit that the decrees of the lower court should be affirmed.

Respectfully,

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Of Counsel.